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SECTION 1201

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RULEMAKING HEARING: EXEMPTIONS FROM PROHIBITIONS ON
CIRCUMVENTION OF TECHNOLOGICAL MEASURES THAT CONTROL
ACCESS TO COPYRIGHTED WORKS

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Wednesday,
May 14, 2003

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The hearing was held at 9:00 a.m. in the 2002-4C, UCLA
Law School Moot Courtroom, Los Angeles, CA, Marybeth Peters,
Register of Copyrights, presiding.

PRESENT:

MARYBETH PETERS	Register of Copyrights
DAVID CARSON	General Counsel of Copyright
CHARLOTTE DOUGLASS	Principal Legal Advisor
ROBERT KASUNIC	Senior Attorney of Copyright
STEVEN TEPP	Policy Planning Advisor

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P-R-O-C-E-D-I-N-G-S

9:10 a.m.

MS. PETERS: Good morning. I'm Marybeth Peters, the Register of Copyrights. And I would like to welcome everyone to the first day of hearings in Los Angeles in this Section 1201 anti-circumvention rulemaking.

The purpose of this rulemaking proceeding is to determine whether there are particular classes of works as to which users are or likely to be adversely effected in their ability to make noninfringing uses if they are prohibited from circumventing technological measures that control access. That's quite a sentence.

Today we have several sessions. And the first one will deal with filtering software. The second will deal with malfunctioning, damaged and obsolete technological protection measures, as well as research security in the public domain. And the afternoon session will deal with copy protected CDs.

You should know that comments, the reply comments and the hearing testimonies will form the basis of evidence in this rulemaking which, in consultation with the Assistant Secretary for Communications and Information of the Department of Commerce will result in my recommendation to the Librarian of Congress. The Librarian must make a determination before October 28, 2003 on whether or not there

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1 will be any exemptions to the prohibition during the next
2 three year period.

3 The entire record of this, as well as the last
4 1201 rulemaking, are on our website. We will be posting the
5 transcripts of all hearings approximately one week after each
6 hearing.

7 The transcripts as posted are uncorrected, but
8 each witness does have an opportunity to correct the
9 transcripts.

10 Let me take this moment to introduce the rest of
11 Copyright Office panel. To my immediate left is David Carson,
12 who is our general counsel. To my immediate right is Rob
13 Kasunic, who is senior attorney and advisor in the Office of
14 the General Counsel. To his right is Charlotte Douglass, who
15 is a principal legal advisor to the General Counsel.

16 I'm going to try to change this. Last time I
17 said to the far was Steve Tepp. That's the far left. And he
18 said I've never been characterized that way, Marybeth. So, to
19 the left of the General Counsel is Steve Tepp

20 MR. TEPP: That's even worse.

21 MS. PETERS: Whatever. Policy planning advisor
22 in the Office of Policy and International Affairs.

23 The format of each hearing is that each panel
24 has 3 parts. First, the witnesses present their testimony,
25 and obviously this is your chance to make your case and your

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1 chance to rebut his case. Then we get to ask questions and,
2 hopefully, they will be equally tough for each side. You
3 should not take any of our questioning as an indication of
4 what we think. This is just the exercise by which we dig out
5 information. Even our facial expressions should not in anyway
6 be taken to reflect what we think. Because the truth is at
7 this moment we have made no decision, and we haven't even sat
8 down amongst ourselves to talk about any particular exemption
9 or what the evidence is. So it's all totally wide open.

10 If in fact this hasn't happened there's an
11 opportunity to the panel for each of you to question happen.
12 Mostly it's happened that during our questioning you sort of
13 question each other.

14 Obviously, because we have some time constraints
15 here, we do reserve the right to ask each person who testifies
16 to answer any additional questions. And, obviously, those
17 questions will be made and the answers will be made available
18 to everybody.

19 I want to at this point thank David Nimmer of
20 USCLA who was instrumental in getting these very nice
21 facilities for us, and actually thank UCLA for all the work in
22 making this possible.

23 So without further ado, I should mention that
24 Jeff Joiner has joined us, and he's an attorney with NTIA,
25 National Telecommunications and Information Administration. So

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1 he's representing the Assistant Secretary that I referred to
2 as having a consultation involving in this process.

3 The first panel is dealing with filtering
4 software. And the witnesses are James Tyre from Censorware
5 Project and Steve Metalitz, who filed on behalf of many
6 copyright owners a very extensive statement.

7 So we start with the proponent of an exemption
8 and then we go to the other side. So we will start with you,
9 Mr. Tyre.

10 MR. CARSON: The microphones.

11 MS. PETERS: Oh, yes, the microphones. The
12 microphones are actually not to project the sound to everybody
13 who is here. The microphones are solely to assist the
14 recorder. So, when you speak as when we speak, you need to
15 really speak out so that everybody in the room can, in fact,
16 hear you. Okay? Thank you.

17 MR. TYRE: Thank you. My James Tyre, as you
18 indicated. I'm here on behalf of the Censorware Project.

19 I'm probably at least a little bit of a mystery
20 both to you on the panel and to Mr. Metalitz because, unlike
21 the people who spoke in Washington all of whom I know fairly
22 well and also unlike Mr. Metalitz, I was unable to submit
23 written comments. So I come here as a bit of a blank slate.
24 And that being the case, I want to tell you just a little bit
25 about myself and what the Censorware Project is to put the

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1 testimony I'm going to give in perspective.

2 I am a lawyer here in the Los Angeles area. I
3 have been in practice since 1978. Much of my practice, though
4 not all of it, has been devoted to First Amendment issues. And
5 it was the First Amendment aspect of Censorware that brought
6 me into this particular field that got me interested in it:
7 First, really as something interesting just to explore, then
8 working really with it. Then starting to think about the legal
9 ramifications of it.

10 The Censorware Project is a group currently
11 consisting of four people, myself, Jonathan Wallace, Jamie
12 McCarthy, Bennett Hazelton. Originally there were two others,
13 including Seth Finkelstein from whom you heard a great deal
14 when you had a session in Washington. Seth has not been a
15 part of the group since about 1998/1999, somewhere in that
16 area. But certainly he was essential when we started the
17 group.

18 What happened is that it was around 1995 when
19 the issue of Censorware began to become an issue. Seth was
20 telling you that he had been on the Internet since 1985. He
21 had been seeing a lot of changes in it. I cannot tell you
22 that I'm much of an Internet veteran. But fairly shortly after
23 I did get onto the Internet, I happened upon an email
24 discussion group that had to do generally with issues of
25 censorship regarding the Internet, and specifically it was

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1 censorware. And I got interested in it, not so much in the
2 sense that I was immediately thinking about filing a legal
3 case or anything of that sort, but I got interested in the
4 implications, specifically First Amendment implications, at
5 some point other possible theories that might be available for
6 use with censorware. And, obviously the First Amendment
7 implications would apply only if the censorware was being used
8 in a public institution.

9 We have never taken the position, I don't know
10 anyone that's ever taken the position, that if a family
11 chooses to use censorware in the home or if a private
12 corporation chooses to use it at the workplace, that there are
13 any First Amendment issues there. We may criticize it because
14 we don't like censorware does, but we make no claims that
15 there's any particular legal significance to it.

16 In any event, it was in 1995/1996 when this was
17 really a hot topic, and it became quickly apparent that there
18 was a group of us that had a fairly common interest. And I
19 should also indicate that one of the other witnesses from whom
20 you heard a lot in Washington, David Burt, was a part of these
21 discussions. I believe I first encountered him on the Internet
22 in 1996 or possibly 1997.

23 So many of us who have been working in this
24 field, regardless of which side we're on, are old
25 acquaintances. Whether we're friends or not is a different

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1 story, but we've known each other for quite a long time.

2 But what happened was, and I know you've heard a
3 little bit about the Mainstream Loudoun case in Virginia.
4 That case, actually, was essential to how the Censorware
5 Project came to into being. And it's actually a good
6 illustration of what the kind of work we do and what the
7 effect has.

8 Jonathan Wallace, one of the founding members of
9 the Censorware Project, like myself, is also an attorney. And
10 he had done some writing on his own site, "The Ethical
11 Spectacle," spectacle.org about what he viewed as some of the
12 legal issues involving censorware. And it was a very good
13 essay he wrote. This would have been probably in 1996/1997.
14 And it was about that time when in Loudoun County, Virginia
15 the public library was considering putting in censorware, and
16 specifically a particular version of X-Stop called the Felony
17 Load. And a lot of censorware companies and censorware
18 products have changed names, so I just indicate that the
19 product that then was known by X-Stop then was manufactured by
20 a company called Log-On Data Corporation. That product
21 actually is the product of one of the three companies that
22 signed on to David Burt's comments, that being 8e6
23 Technologies. At some point the company changed its name. So
24 we're talking about a product of that company.

25 But there was a group in Loudoun County called

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1 Mainstream Loudoun. It was extremely concerned with the
2 implications of censorware being used in their libraries. So
3 the head of that group sent an email to Jonathan Wallace and
4 said we really like what you've written in your essay, but can
5 you help us? Can you give us something more tangible. And,
6 again, this was before the Censorware Project as a group
7 existed. But Jonathan contacted two people: Myself, Seth
8 Finkelstein, said can we do something to help these people.
9 The answer was yes.

10 You've heard about some of the decryption work
11 that Seth Finkelstein did. At that time he decrypted the X-
12 Stop blacklist. He and I together poured through that list
13 looking for the flaws in it and we fed the results from that,
14 from our work there to Jonathan Wallace who wrote a scathing
15 article about X-Stop.

16 One of the interesting things was that X-Stop
17 was a fairly new product on the market at the time. And it
18 had gotten a number of glowing endorsements from quite a
19 number of people, including specially David Burt, who at that
20 time was still a librarian not working for N2H2.

21 And we put out that report. And everybody went,
22 in effect, "Oh, my God." And everybody who endorsed that
23 product, including David Burt, ran away from it as fast as
24 they could. Everyone except Loudoun County Public Library
25 system.

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1 So, the lawsuit was filed with a lawyer by the
2 name of Bob Guenfeer representing the plaintiffs, who were
3 library patrons. Shortly thereafter a group of website owners
4 whose content was being blocked in the libraries represent by
5 Ann Beeson of the ACLU intervened on the plaintiff's side in
6 that case. The lawsuit went forward.

7 David Burt makes a technically correct statement
8 but very misleading statement in his chilling reply to the
9 effect of there's nothing in the court record to indicate that
10 the Censorware Project in general or Seth in particular had
11 anything to do with developing the evidence in the case. That
12 statement is 100 percent correct and 100 percent misleading.
13 Because what happened was Seth decrypted the list not just
14 once, but on many, many, many different occasions because you
15 want to see what happens as they find out about new bad
16 blocks, whether they unblocked them, what new they've added to
17 the black list, things like that. Through the Censorware
18 Project we were analyzing the lists, we were going through the
19 lists. We were feeding the list bad blocks to the appropriate
20 people involved in the case.

21 So it may well be that the court record says
22 that library patron X has a declaration that says "I found
23 these 6 bad blocks using the library terminals and, thus,
24 using X-Stop as installed in the libraries." Guess were he
25 found out where to look at those websites?

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1 That was the impetus of how the Censorware
2 Project was formed. The three of us working on that and then
3 we added in three other people as we went on to other
4 projects.

5 The first project we did as a group was a
6 dissection, also based on decryption of CyberPatrol, which
7 you've heard a good deal about, specifically in the context of
8 the Microsystems lawsuit. A lot of these products, as I said,
9 have changed names over the years and CyberPatrol along with
10 another product SurfWatch now have been merged into a product
11 called SurfControl, which I'll be talking about a little bit
12 today. So I want to sort of keep the players straight.

13 It's interesting one of the things that's said
14 in the joint reply comment; and for this purpose, I'm talking
15 about joint reply, hopefully you will just assume that I'm
16 focusing on the joint reply filed by Mr. Burt. I have no
17 intention of sliding or viewing Mr. Metalitz' comment, and I
18 will address some of the things you have. But I'm sure he
19 would agree that there's a great deal more detail, and
20 properly so, in the joint reply of the censorware companies
21 than in that which Mr. Metalitz put together.

22 Mr. Burt said, and I believe this was actually
23 in his testimony as opposed to in the joint reply, he said
24 have reports based upon decryption ever really helped you at
25 all? And he said "No, they don't help us at all." And, of

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1 course, I'm paraphrasing. I don't have an exact quote in front
2 of me. Because they just talk about a few sites here and
3 there. They're really not of any use to us.

4 Well, there's this interesting little phenomenon
5 because every time we have done a report, regardless of what
6 the software it is, and we have done major reports upon
7 CyberPatrol, X-Stop, SmartFilter, WebSense and -- I'm missing
8 one. There's one other, I'm temporarily blanking on it. But
9 five of them. Every time we've done a report, within 2 days
10 the appropriate censorware company has gone through our
11 reports, whether they were based on decryption or some other
12 techniques, and guess what? The sites that we said were bad
13 blocks suddenly are off the list. It's folly to say that the
14 censorware companies do not pay attention to what we do and
15 that they put little credence into the reports that are based
16 upon decryption or other techniques.

17 We started the Censorware Project in 1997. We've
18 been doing this since then. We're strictly a volunteer group.
19 We all have real jobs, other things to do.

20 These kinds of reports, frankly, are a great
21 deal more difficult to do than they used to be. I remember the
22 good old days when a censorware black list might have 10,000
23 or 15,000 items on it. It was big news in the industry when
24 the first censorware black list had 100,000 items. Now,
25 according to David Burt's testimony a month ago, and I believe

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1 him, the N2H2 black list has 4 million items on it. It's hard
2 work to go through these lists. So it's not as easy to do
3 these kinds of reports as it used to be. But, every report
4 that we have done based upon decryption and based upon other
5 techniques we have used, has been taken very seriously by the
6 censorware companies and by other people.

7 My primary purpose today is to go through and
8 counter some of the statements that Mr. Burt made, both in his
9 written comments and in his oral testimony. And really focus
10 on one broader issue.

11 You've heard testimony that, in essence, there
12 are three types of ways of doing this sort of work. The first
13 way is to start off by decrypting the encrypted database and
14 having decrypted, analyze it by whatever means one does,
15 drawing whatever conclusions and making whatever report one
16 wants to make based upon that. That's what's at issue here
17 today.

18 But what's relevant to whether this exemption
19 should be extended for another 3 years isn't just that
20 question. I think one thing that's unique about this
21 particular class, both as the exemption was granted 3 years
22 ago and if it should be granted again for the next 3 years, is
23 nobody disputes that the study of censorware is an incredibly
24 important, very legitimate course of study. There is nothing
25 silly about it. There is nothing frivolous about it. It is

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1 socially important. It is legally important. No one has ever
2 disputed those contentions. Certainly David Burt never has,
3 and I don't think that Mr. Metalitz will, though I certainly
4 presume to be able to read his mind.

5 The only question here is whether the importance
6 of being able to continue doing encryption based studies as
7 opposed to other techniques is sufficient to justify the
8 continuation of the exemption. So when I get into my
9 testimony, and I realize you want to keep the opening
10 statement short and I've spent a fair amount of time just
11 giving you some of my background so I'll hold off on this
12 until we get into the question period, but I do want to spend
13 a fair amount of time focusing on the specific issue of the
14 benefits of doing decryption study versus doing what is called
15 either database querying or sampling versus what has been
16 called log file analysis. And in some cases log file analysis
17 really is nothing more than a subset of database querying or
18 sampling. In some cases it's a little bit different.

19 One project we as the Censorware Project did is
20 a little bit different. We've done them all, so I'm in a
21 position that not many are in to speak to the benefits and
22 detriments of all of them. And I'd like to spend the bulk of
23 time, hopefully once we get into the questions, talking about
24 the differences, specifically talking about the weaknesses
25 with database querying. And as a subset of that, very much

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1 talking about the weaknesses of the URL checkers, which you've
2 heard a lot about by N2H2 and some, but by no means, all of
3 the other censorware companies offer.

4 And with that, I suspect, I've talked more than
5 enough for what you want to hear as an opening statement, so I
6 will defer to Mr. Metalitz and then get to questions later.

7 MS. PETERS: Okay. Thank you very much, Mr.
8 Tyre.

9 Mr. Metalitz?

10 MR. METALITZ: Thank you very much. It's a
11 pleasure to be back here.

12 I was thinking back to the last time that I was
13 in this position before this panel, which was 3 years ago in
14 Palo Alto. And much has changed since then. We live in a
15 different world, some might say, than we did in the summer of
16 2000.

17 And on a less consequential scale, things have
18 changed in the nature of this proceeding as well. And if I
19 might, if I could just take a minute for some general
20 observations before I turn to the subject of filtering
21 software.

22 I really want to talk about three things that
23 have changed that are quite relevant to this proceeding and
24 that I hope will be reflected in the decision that ultimately
25 results from this proceeding.

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1 The first change, of course, is that the
2 prohibition that we're talking about 1201(a)(1) is now in
3 force, and it wasn't three years ago. So, you know, I think
4 this proceeding can now turn to what Congress said should be
5 its main focus, which is determining whether a substantial
6 adverse impact on the availability of works for noninfringing
7 uses is actually occurring rather than focusing as was
8 inevitable in the 2000 proceeding on speculation or prediction
9 about what would occur once the prohibition went into effect.

10 So I think that the burden that the proponents
11 of exemptions must carry in this proceeding, as they did in
12 2000, they had the burden of persuading you to recommend to
13 the Librarian that an exemption be granted for a particular
14 class of works, but they also needed to come forward with
15 concrete evidence of the substantial adverse impact that is
16 actually occurring and that is caused by the presence of
17 1201(a)(1).

18 Similarly, if they challenge the interpretations
19 that you have made of the statute, whether these be procedural
20 ground rules for the proceeding or the substantive conclusions
21 that you reached in 2000, that is also a burden of persuasion
22 that they must undertake and they would need to persuade you
23 why you were wrong in some of the conclusions that you reached
24 last time.

25 The second thing that has changed is that we now

1 have some court decisions that have really vindicated the
2 interpretations that you recommended to the Librarian in 2000
3 and that he adopted them on some key aspects of Section 1201.
4 Of course, there haven't been any court decisions directly on
5 Section 1201(a)(1), but the decisions on other aspects of the
6 statute have clearly established a point that is consistent
7 with your conclusions three years ago, and that is that fair
8 use, one of the noninfringing uses we're talking about here,
9 does not encompass a guarantee of access to copyrighted
10 material by a preferred method or in a preferred format.
11 That's stated very clearly in the Corley decision in the
12 Second Circuit, echoed in the ElCom decision in the District
13 Court here in California. And I think it's quite consistent
14 with the conclusion that you reached 3 years ago.

15 The third change that has occurred over the last
16 3 years, and one that I will come back to later on today and
17 tomorrow, is that there has been a huge expansion of
18 availability of all kinds of works in digital formats for
19 noninfringing uses. Really we can speak of a digital
20 cornucopia that is now available to the American public to a
21 much greater degree than was the case 3 years ago. And much
22 of this is attributable to the use of formats and distribution
23 methods that rely upon technological protection measures, and
24 particularly upon access controls. And we've given some
25 examples in our reply comments.

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1 We'll talk more about the DVD tomorrow. We'll
2 talk about online music distribution this afternoon as well in
3 the software field, entertainment software, business
4 applications, digital and online delivery of text and
5 database. The fact is that today measured against 3 years
6 ago, we have far more availability by far more people to far
7 more material in digital form than we did 3 years ago.

8 And the significance of this is really twofold.
9 One, your mission is to determine whether the availability of
10 these materials for noninfringing uses has been substantially
11 adversely affected by Section 1201(a)(1). And this includes
12 the availability through licenses, through permitted uses and
13 other types of noninfringing use. So if those have increased,
14 then the availability of these works has also increased and
15 you need to take that into account.

16 Second, I want to emphasize that as you
17 recognized in your conclusions in 2000, you are really
18 performing here not a one sided calculation, but a net
19 calculation. And even in instances where you find some adverse
20 impact on the availability of works for noninfringing uses,
21 you also have to look at the degree to which technological
22 protection measures have facilitated this use. It is a net
23 calculation, and I think Congress was correct when it said the
24 question here is whether on balance there has been an adverse
25 impact on the availability for noninfringing use that is

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1 substantial enough to justify an exemption.

2 So this is a question I'm going to come back to,
3 not really as a promotion for what the 17 organizations that I
4 represent here have done in terms of making material available
5 to the public, but simply as a way to shed light on the
6 balance that you need to strike in the proceeding that we're
7 engaged in.

8 Well, let me turn now to the question of
9 filtering software and just briefly summarize our position on
10 this.

11 First of all, the exemption that's been proposed
12 is verbatim the same or almost the same as the one that is in
13 existence now. So it presents squarely the question of how
14 you should proceed in judging whether the exemption should be
15 recognized for an additional 3 years. And I think nothing is
16 clearer from the legislative history and also from your prior
17 conclusions that this is a de novo determination. The burden
18 remains on the proponents. And the fact that there has been an
19 exemption in effect for the current 3 years does not weigh in
20 the balance as to whether there should be a new exemption
21 recognized for an additional 3 years.

22 I think with regard to filtering software,
23 unlike the other exemption that we'll talk about later on
24 today, I think at least some of the proponents of the
25 exemption have made an effort to shoulder that burden and

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1 tried to present to you with information to demonstrate how
2 the exemption has operated in practice and why it is needed,
3 why it is still needed or why it should be renewed. I think
4 Mr. Tyre's presentation also was along that line. But I did
5 want to underscore the de novo nature of the determination and
6 the fact that the burden remains on the proponents to bring
7 forward, again, concrete evidence about what is actually
8 occurring.

9 Now, in the 2000 rule recommendations that was
10 adopted by the Librarian, you essentially had an uncontested
11 proceeding. I think the conclusion virtually states that, and
12 there are several conclusions that were drawn there. For
13 example, people who wanted to make fair use of the type of
14 comment and criticism use that Mr. Tyre's talked about of
15 these lists of websites had no alternative but to decrypt
16 them. That there was no other legitimate way to obtain access
17 to this information. And you also had no other evidence
18 before you at that point, according to your conclusion, that
19 these technological protection measures were at all use
20 facilitating or that granting an exemption for decrypting them
21 would decrease their availability in anyway.

22 I think all of those points are now very hotly
23 contested in the proceeding before you. You have an extensive
24 submission from several of the companies, and you had
25 testimony April 11th. And I know Mr. Tyre will be rebutting

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1 some of that testimony as well. My point is simply that you
2 now have the issue joined before you, and I think you're in a
3 position to determine whether the proponents of the exemption
4 can carry the day. But certainly the record before you raises
5 a question about whether you can, in fact, find out without
6 decryption whether any given site is blocked by one of these
7 programs. And you also have evidence, which I'm sure Mr. Tyre
8 will comment on, that there has been a great deal of research
9 and comment and criticism that's been undertaken of these
10 programs by methods that do not involve circumvention of
11 technological controls.

12 Now, one other factor that I think is extremely
13 relevant here, which is what use has been made of this
14 exemption during the period since it came into force in
15 October of 2000 up until today, I think that as least as of
16 the beginning of this hearing the record was quite murky about
17 that, as I read the transcript of the April 11th hearing. It
18 wasn't clear what the witness testifying there actually had
19 done.

20 Now Mr. Tyre's testimony that describes a little
21 bit of what he did and perhaps he will pursue that further to
22 find out whether those acts of decryption took place before or
23 after the exemption came into force. But as we pointed out in
24 our reply comments, it is relevant what use is being made of
25 this, how often it's being used, how many people are using it.

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1 And I hope you can develop the record on that before you reach
2 a conclusion about this exemption.

3 Now, I'm not sure that the organizations that
4 filed our joint reply comments really have much light to shed
5 on how some of these contested issues should be resolved. But
6 I do want to just refer to three aspects of the evidence as it
7 stands now that I think are relevant.

8 First, I think you have to determine whether
9 what the proponents are seeking is the preferential or optimal
10 means of obtaining access of this information for their fair
11 use purposes or by contrast, do they have sufficient access to
12 it now, is it sufficiently available for them to carry out
13 these types of activities without circumventing? And this, of
14 course, has to be gauged in the light of the conclusion that
15 you reached in 2000 and that the courts reenforced in the
16 ensuing two years that fair use does not necessarily mean fair
17 use in the preferred or optimal format. Just noting access to
18 material in a preferred or optimal format.

19 The second issue is the scope of the adverse
20 impact. Is it de minimis or widespread? And, again, this
21 gets to the question of what actually is being done under the
22 shelter of this exemption today.

23 And the third point which I hope that the record
24 will be developed on is whatever adverse impact there is can
25 be ameliorated or even eliminated in other ways such as

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1 through private agreements. And I thought there were some
2 tantalizing hints of this in the testimony you heard on April
3 11th about the potential availability of these lists to bona
4 fide researchers under agreement with the proprietors, the
5 people that compiled them and that have the copyright interest
6 in them.

7 I think it's Mr. Tyre's right that some of these
8 reports have been taken very seriously, and there may be a
9 very active interest on the part of some of these companies in
10 cooperating with researchers, which might correspondingly
11 reduce the need for any exemption in this area.

12 Now, finally, I just want to come to our main
13 concern about this exemption. And I hope I don't get too
14 deeply into the arcane and metaphysical question that I'm sure
15 we will grapple with today and tomorrow, which is what is a
16 particular class of works in terms of the statute. I think
17 this is actually a simpler question as to whether this class
18 that you recognized in 2000 is too broad. I'm going to assume
19 for now that the class you recognized fits the criteria of the
20 statute. In other words, it describes a particular class of
21 works.

22 And I want to emphasize this point, because we
23 do live in a different world today than we lived in in the
24 year 2000. And I think our concerns about computer security
25 and about protection of the safety and security of our

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1 computer networks is heightened today contrasted to where we
2 might have been in the year 2000.

3 We know that filtering software that may fit the
4 description that appears in the exemption that exists now is
5 one of the key tools in keeping our network safe and secure.
6 And many of those filtering software packages may include
7 lists of websites that either are the sources of viruses or
8 the source of SPAM, which is of course is a scourge that we're
9 all having to deal with increasingly now.

10 In other words, that programs that really I
11 don't think anyone in Mr. Tyre's would consider censorware may
12 be swept within the ambit of this exception with potentially
13 very serious consequences in terms of compromising the
14 security and safety of computer networks.

15 Now, of course, there's no evidence in this
16 record whatsoever that there has been any substantial adverse
17 impact on the availability of copyrighted materials for
18 noninfringing uses or that there would be any of the action of
19 circumventing access to those types of security software lists
20 were to be prohibited. So there's really no basis for
21 extending or maintaining such a broad definition of this
22 particular class of works with the breadth that would include
23 those kinds of security programs.

24 And I think one thing that I hope that the panel
25 will is, and I think Mr. Tyre and his group could probably

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1 make a very important contribution here, is to more narrowly
2 focus this exemption if you conclude based on the testimony
3 that you hear and the contested issues that are before you,
4 that it is justified and that the proponents have met their
5 burden with respect to censorware, then I think the exemption
6 needs a definition of censorware. The exemption needs that in
7 order to more tightly focus it on the area where the need for
8 it has been shown.

9 And, again, because of the name of this project,
10 I'm sure Mr. Tire can provide you with a proposed definition
11 of censorware that might be useful to you and that might fit
12 better within the definition of a particular class of works
13 that Congress urged you to look at.

14 So, I will conclude there and be glad to try to
15 answer any questions you may have either about my general
16 remarks or about the filtering software exemption. Thank you.

17 MS. PETERS: Thank you.

18 Let me start the questioning, and actually you
19 asked the questions that I sort of had identified.

20 Mr. Tyre, you talked about the three ways in
21 which people try to deal with what's in the fire of
22 CyberPatrol or whatever. And you mentioned decrypting and
23 analyzing, and then reporting database inquiry log file
24 analysis. Could you tell us why the database inquiry and the
25 log file analysis is not sufficient and why the decryption

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1 method is not only the preferred, but the only way that you
2 can do what you want if you can do that? And comment a little
3 bit about Mr. Metalitz' issue with regard to wouldn't special
4 agreements work?

5 MR. TYRE: Okay. I'd be perfectly glad to talk
6 about that. I think that's the main reason why I'm here today,
7 as a matter of fact. And this actually does go both to what
8 Mr. Metalitz has said today and what he has in joint reply,
9 and also what happened in the Washington testimony.

10 I'm going to break it down into segments. And
11 let me refine one thing that you just said.

12 We have never contended that the other methods
13 based upon any technique other than decryption of doing this
14 kind of work are completely inadequate. We've done studies
15 using log file analysis and database querying ourselves.
16 There's lots of things you cannot find out using those
17 methods. They are not nearly as good as decryption and
18 analysis based upon description. But we are not saying, and I
19 want the record to be clear on this, that they are useless.

20 MS. PETERS: So you think they're too limited?

21 MR. TYRE: Yes.

22 MS. PETERS: Okay.

23 MR. TYRE: Yes.

24 Now, I want to start off with database querying
25 or sampling, and I want to start even more focused on that

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1 with the specific question of so-called URL checkers because
2 Mr. Burt told you and he gave screen shots in his joint reply
3 comments of the URL checkers that four censorware companies,
4 his own, N2H2, WebSense, SmartFilter and SurfControl, which is
5 what used to be CyberPatrol have. They're web interfaces. You
6 can go to them. You can type in a URL and it'll tell you it's
7 not blocked, it's blocked in this category, it's blocked in
8 that category. Great. What's the problem?

9 Problem number one: Mr. Burt used very careful
10 language to tell you about those four and no others. If you
11 want to take a look at my Exhibit 2 in your booklets, this is
12 just a little survey I did on Monday just confirming results I
13 already knew.

14 I checked the nine major censorware copies. How
15 many of those censorware companies even offer URL checkers?
16 Exactly the four that Mr. Burt mentioned and not one more.
17 Four out of nine offer them.

18 And I should note that two of the three who
19 signed onto Mr. Burt's joint reply companies, 8e6 Technologies
20 and Be Safe Online do not offer them. So we've got nine major
21 censorware companies, five don't even have them. So let's
22 completely throw them out for purposes of talking about URL
23 checkers. That's half the industry right there.

24 Now, there are other players than just these
25 nine, but I choose the nine major players because I didn't

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1 want to make this list too extensive. And between these nine
2 we have most of the field covered.

3 Then I want to talk specifically about one
4 particular URL checker, that being the URL checker of
5 WebSense. And I ask you to flip over quickly to Exhibit 3.
6 WebSense's URL checker is different from that of all the
7 others. Because with all the others, N2H2, SurfControl, you
8 just go there, you type in to your heart's content, you get
9 whatever results they give you. Not WebSense. WebSense as
10 you can see from the form here they make you register using a
11 real email address, you can't even use a webmail address such
12 a yahoo.com or hotmail.com, or something like that. You also
13 can't use an AOL.com address or an earthlink.net address, or
14 something of those sorts because they consider those to be
15 addresses for home users, not for serious business Internet
16 uses. That's an interesting assumption on their part, but
17 that's the assumption they offer. And it's spelled out right
18 here in this little exhibit. It's one of the reasons why it
19 printed out.

20 So as long as you have a good enough email
21 address to satisfy their criteria, then they will email you a
22 password and if they email you the password, then and only
23 then can you access their URL checker.

24 And if you look at the very bottom of page 1 of
25 Exhibit 3 going over to page 2, you'll find their terms of

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1 service. And their terms of service say, in a nutshell, you
2 can use this if you are a customer or you're seriously
3 considering becoming a customer of WebSense.

4 So the minute I clicked on that, I violated
5 their agreement. They can sue me if they want. I'm saying it
6 openly. I have no intention of ever becoming a WebSense
7 customers, but that's what I had to do to get access to their
8 URL checker.

9 Then here's the real flaw in WebSense. Let's go
10 to Exhibit 4. It's a big exhibit, you do not have to look at
11 all pages.

12 The first URL I called up on their URL checker
13 just because it might amuse you was something called
14 www.copyright.gov/1201. And you'll be happy to know that you
15 are classified as a government site in their web checker. It
16 might have made for a good joke if you were classified as a
17 porn site, but they got this one right.

18 MR. CARSON: There's a lot of scurrilous
19 information in there.

20 MR. TYRE: Now, if you want at your leisure, you
21 can go through the next 21 pages. I don't really care. What I
22 want you to do right now, this is a test I ran going through
23 this just manually entering URLs at random. For the purposes
24 of this test I don't care whether their classification of any
25 particular website was right or wrong. What I do care about,

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1 and I've replicated this experiment more than several time;
2 this was not an anomaly, is that after running 21 pages, what
3 you see in the first 21 pages of this exhibit. You get to page
4 22, and please forgive me if I have to squint a lot when I'm
5 reading things, but I don't have a whole lot of eyesight.

6 But on page 22 WebSense site look up tool.
7 "Your organization has exceeded the maximum number of lookups
8 for a single day. Please try again tomorrow. WebSense has
9 implemented a limit to ensure the use of the master database
10 for WebSense customers and prospects only. Thank you for your
11 understanding." Twenty-one a day. That's very helpful. I
12 hope the record reflects I was being highly sarcastic in
13 saying that.

14 I think we can pretty well discount WebSense URL
15 checker as a valuable research tool. So now we're down to
16 only three companies out of nine that have even potentially
17 valuable URL checkers.

18 The next exhibit, Exhibit 5, all of these were
19 done from N2H2's URL checker. These were not done to show any
20 particular problem with N2H2's URL checker. It has had
21 problems in the past. Those problems apparently do not exist
22 anymore, so I'm not going to talk about those problems.

23 I created these exhibits to illustrate in a
24 fairly tangible fashion what some of the problems with
25 database querying is. And for purposes of this, it does not

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1 matter whether in this particular case I happened to be using
2 a URL checker, as I did for this exhibit, or whether I
3 happened to have a running copy of N2H2 and I'm doing more
4 extensive database querying. The problem is the same.

5 In the CIPA trial, CIPA being the Children's
6 Internet Protection Act the formal case being American Library
7 Association v. United States. There was expert testimony, and
8 this necessarily was very rough, that there are approximately
9 2 billion webpages out there. That was a year ago. We don't
10 need an expert to sit here today and tell us that same expert
11 would give us a much larger number today. And it wasn't
12 actually 2 billion webpages, it was 2 billion indexable
13 webpages. Only those pages that can be found and indexed by
14 search engines, which is a subset of the entire web.

15 I could explain that if you want, but I think
16 the figure of 2 billion by itself is big enough to make one of
17 my points.

18 Then you have something like N2H2, which has a
19 database of 4 million entries, according to David Burt. That
20 doesn't necessarily mean that they block 4 million websites.
21 Those 4 million entries could block, for all we know, 7 or 8
22 million websites. For example, as all of the censorware
23 companies do, they have blocks in certain of their blocking
24 categories on the free web page services. All of them block
25 Geocities or what used to be geocities. Now it's

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1 pages.yahoo.com in at least one of their blocking categories.
2 That's only one entry in their database, but that entry in
3 their database puts a block on however many tens of thousands
4 or maybe even hundreds of thousands pages there are on
5 Geocities, as I still prefer to call it because I'm just used
6 to saying that.

7 You think about those numbers, 4 million entries
8 in the database, 2 billion webpages. Not websites, webpages.
9 How is one going to devise a statistical sampling of a
10 database query that it's going to find truly meaningful ways
11 of discovering what the problems in the database are?

12 And this next set of exhibits is intended to
13 illustrate for any database querying method, not just for N2H2
14 URL checkers, that there are problems with that can be solved
15 by decrypting, looking at the list, but that cannot be solved
16 effectively simply by database querying.

17 Now you'll see on the first page of Exhibit 5 I
18 called up the site peacefire.org to see how it was classified.
19 And it's classified not currently categorized in the N2H2
20 database. Great. Peacefire's clean. Don't have to worry
21 about it. Move on to the next domain name, right? Wrong.

22 Turn to the next page. Go to a subdirectory in
23 peacefire.org, peacefire.org/bypass. That subdirectory is
24 blocked by N2H2 as a loophole site. And I believe you heard
25 just a little bit about what a loophole site is, so I'm not

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1 going to further burden the record with that. I just chose
2 that one because I happened to know that it was there, not
3 because I want to further burden the record talking about what
4 false sites is.

5 So, what do you do when you build a database for
6 purpose of doing a database inquiry? Do you do it just with
7 domain names? Do you do with directories? Do you do it with
8 subdirectories? How do you build that database and how do you
9 even know what subdirectories that you are to include in the
10 database? This is a problem.

11 Another example, the same problem. And I'm glad
12 they're sitting behind me, because I wouldn't want to be
13 talking their back. But the next page of Exhibit 3 I called up
14 eff.org. They're clean. Not categorized. Wrong. Turn to the
15 next page, their Blue Ribbon Campaign, which they've been
16 running since perhaps 1993/1994 is in the world according to
17 N2H2 a drug site. And I thought it was important that you
18 know N2H2 thinks it's a drug site, because later today and
19 tomorrow you're going to be hearing a lot from EEF personnel,
20 and you really ought to know the quality and caliber, at last
21 according to N2H2 of who you're dealing with. Who in this
22 right mind who has ever looked at the EEF Blue Ribbon site
23 could possibly think it's a drug site? How could one imagine
24 searching that particular subdirectory, and yet there it is in
25 the N2H2 database, it's a drug site. So I have a bunch of

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1 druggies sitting behind me according to N2H2.

2 Now, I told them I was going to tell a joke at
3 their expense. I can't see behind me to see if they're
4 laughing or they're staring at me.

5 Now, we turn to the next one and we get to a
6 very interesting example. The next page in the exhibit is
7 snarc.freemove.co.uk. UK being the country code for the
8 United Kingdom. That's the basic route domain. And we see
9 that N2H2 blocks in the games category.

10 So suppose I want to find out how that website
11 is blocked or it's because I happen to be the owner of that
12 website, which I'm not, I type in the website address. I see,
13 okay, it's games. I don't care if it's blocked in games. I
14 only care if it's blocked in the category that a public
15 library likely would use. So I won't do anymore searching
16 because I'm not concerned with the games category. Once
17 again, please turn to the next page we start going down to a
18 subdirectory level. We've got snarc.freemove.co.uk/ -- uh-ho
19 censorware. And guess what. That's illegal. So depending
20 upon where we are on that site, we have N2H2 taking the same
21 site, categorizing it under two completely different
22 categories. If I was just setting up random database, how
23 would I know, particularly if I didn't have the knowledge and
24 experience that I had, to know that gosh, they may classify
25 part of the site one way, they may classify another part of

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1 the site a different way?

2 And then I want to turn to the final example
3 where I'm going to walk you through a series of 4 pages to
4 show just how far you have to dig to find some of these.

5 This next site is danny.oz.au, AU being the
6 country code for Australia. The route domain name free bill of
7 health from N2H2.

8 Let's go down one directory to the next page,
9 danny.oz.au/freedom. Clean bill of health. No problem.

10 Let's go to the next page, down one more
11 subdirectory level, danny.oz.au/freedom/censorware. Well,
12 that censorware site's okay. No problem.

13 Let's go to the last page of the exhibit going
14 really deep into that site,
15 danny.oz.au/freedom/censorware/infilter.html. Uh-oh, we've got
16 profanity there.

17 Now, how far have we had to dig into that site
18 to find something N2H2 blocked? How could anybody in the real
19 world as opposed to in some completely theoretically world
20 even think to go down that far in the directory structure of
21 that website to look to see if there's a block or not. Maybe
22 Danny He, of the owner of this site, might think of that. But
23 I have no clue who else would think of that.

24 And if you're wondering, well, how did I know
25 this if nobody else would think of that? There was some

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1 dispute about whether Seth Finkelstein had decrypted the N2H2
2 black list. I asked Seth to find me examples to prove a point
3 I wanted to make here today. He did not give me the entire
4 decrypted black list. I do not have it. I have never asked
5 it. But I specified to him what I wanted, find examples. He
6 sent me examples.

7 These examples that I just gave to you came from
8 Seth's decrypted black list which Mr. Burt claims Seth never
9 decrypted. That's how I know about these examples, and it's
10 unlikely I ever could have found them without Seth having
11 decrypted the black list and given me these examples.

12 MS. PETERS: So you're basically saying that
13 decryption is the only way to have gotten this?

14 MR. TYRE: Sure. For this purpose, yes.

15 MS. PETERS: Okay.

16 MR. TYRE: Suppose hypothetically I had a list
17 of every domain name in every top level directory, whether it
18 be the big three .com, .org, .net, whether it include the
19 sponsors TLDs whether it be yours, .gov, .mil, whether we get
20 into country codes such as a .au or a .uk; suppose I had the
21 list of every single one of those, could I write a script that
22 would feed every single one of those through N2H2 or
23 SurfControl or so forth? I personally couldn't, but I know
24 many people who could.

25 Let me very quickly say that I personally do not

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1 do decryption because I do not have the technical skills for
2 it. It is a very, very skilled thing to do. And I do not have
3 those skills, but I know a lot about the results of it because
4 I've worked with people who do it.

5 But let's get back to what I was saying. I feed
6 through every single domain name in the world regardless of
7 what TLD is, it's going to give me a picture. It's not going
8 to tell me everything because it's not going to tell me
9 whether a particular site instead of being blocked at the
10 domain level is going to be blocked at a directory level or a
11 3 level below subdirectory level. It's not going to tell me
12 with that snarc.freeseve. site whether it's going to have one
13 kind of block at the route or main level and another kind of
14 block at the lower level. These are the reasons why database
15 querying is not as effective as decrypting the entire black
16 list and going through it.

17 One uses tools to go through it. One can't
18 simply read and black list or else one would go crazy. And by
19 the time one finished reading it, it would be completely out
20 of date in any event. But the only way to find blocks at this
21 level of granularity is by doing decryption.

22 Give you another example, this is an example
23 from the past but it's a good example of why database querying
24 is not good.

25 Most of the studies we do at Censorware Project

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1 we look for so-called overblocking or blocks are wrong or
2 they're bad blocks. Occasionally we've done the other side
3 where we look at underblocking where they don't block what we
4 were supposed to do. We did a study with N2H2 where we did
5 both. But that's one of the few times we've done both sides of
6 it. But there's a very famous example that we did with
7 CyberPatrol.

8 A site called maplesoccer.org. It's a youth
9 soccer league in Massachusetts. You all know what youth
10 soccer leagues are. You can all pretty well imagine what would
11 be on the website of a youth soccer league. Here are the
12 teams, here are the standings, here's the schedule, here's the
13 age groups, all that. Who would think to put that into a
14 database query as part of a sampling?

15 CyberPatrol blocked it. Why did CyberPatrol
16 block it? Because it talked about teens age 13 to 15. Uh-oh,
17 that could be sexual. Could be child pornography. Could be a
18 variety of other things. It wasn't.

19 And the funny thing about that was we exposed
20 that block, CyberPatrol, as did all of the other companies,
21 went back and unblocked. Then they went back and they
22 reblocked it. We exposed the fact that they're stupid, they
23 reblocked this site. They unblocked it. Went back and
24 reblocked it. Not because they're malicious, but because they
25 do most of this by computer robots, not by human review, and

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1 the computer robots are stupid. Computers are not smart for
2 this kind of work. They never have been. Some day they may
3 will be, but they surely are not today.

4 So we did that a second time. They unblocked
5 it, they reblocked it. I won't tell you exactly how many
6 times we went through this cycle, but eventually I decided to
7 have some fun with this.

8 I wrote an open letter, you know, to the
9 President of CyberPatrol: From the President of Cyberpatrol
10 to the PR Director for CyberPatrol, who was actually on one of
11 these discussion lists I was telling you about, and was very
12 active in the discussion. At that time people from all sides
13 really were talking about this. Her name was Susan Getgood.
14 And the memo said something to the effect of "Susan, they're
15 killing me. You've got to find a way that we can't keep
16 reblocking this site. Those Censorware Project guys are just
17 driving us nuts. Fix our program. Do something."

18 They kept reblocking it. They kept unblocking
19 it. Eventually they fixed the problem. And that story is not
20 just a fun little story, but it's an answer to a question that
21 was raised in the first hearing. You know that during the
22 first hearing Seth Finkelstein did have on one or two
23 occasions access to the N2H2 black list. But then N2H2
24 stopped letting him have it, not surprisingly, but they
25 stopped. Was it enough for him to have it once? To analyze

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1 it once, yes. Was it enough for him to determine how many
2 new mistakes they kept making, whether the mistakes are
3 isolated instances, whether they're a problem at the system
4 level? The only way you can do that is if you keep doing this
5 over and over and over again.

6 In the Mainstream Loudoun case we went through
7 probably 8 or 9 different iterations of X-Stop because it was
8 important to see not only whether in the course of discovery
9 the bad blocks that were being revealed were being unblocked,
10 which for the most part they were, but what new bad blocks
11 were being added. It's like the old Jay Leno commercial for
12 Doritos, "we make more." It's guaranteed every time
13 censorware companies add more to their black list, there's
14 going to be more mistakes on them. You have to have
15 continuous access to the list to find out what's on it. It's
16 all fine and good to know what was blocked two months ago, but
17 that doesn't tell you what's blocked today and how systemic
18 the problems are.

19 Now, that's why combining those factors
20 together, doing database querying although it has its uses, is
21 not as effective as doing decryption and having the ability to
22 do the decryption as frequently as possible.

23 MS. PETERS: I asked about private agreements,
24 and you just basically cited and said that Mr. Finkelstein
25 basically had the list but no longer did. Is that a comment

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1 on what agreements might be reached that maybe you can get an
2 agreement to get it once, but having continuous access is a
3 problem?

4 MR. TYRE: The practices vary somewhat from
5 company-to-company. But the normal practice is that you fill
6 out a form, you give them your information. Anytime I've ever
7 done this, I've used truthful information, no fictitious
8 identity. And I believe that the same is true for Seth and
9 other people I know who have done this. You fill out the
10 form, they don't do any particular checking on it, you just
11 enter your information. As soon as it's entered, you can
12 download the 30 day trial.

13 The only time I've known of when that was not
14 the case was with a product called SmartFilter when their
15 sales person after I registered actually called me. And before
16 he called me, he did a search on me and he saw I was a member
17 of the Censorware Project and saw what the Censorware Project
18 did. And he still let me have a sample. It's the only time I
19 know of that's ever happened when a company has agreed to let
20 someone like the various members of the Censorware Project --
21 I think I'll pass on defining whether we're reputable or not.
22 That's for others to decide. Has actually let any of us have
23 something like that with knowledge of who we are.

24 David Burt's testimony in Washington was very
25 specific with a reputable lab, such as Consumer Reports or

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1 something along those lines, we've talked about this within
2 N2H2, but we've not really decided. Maybe if they let us be
3 present while they do their testing, maybe if they sign a
4 nondisclosure agreement, then maybe we'd let them have the
5 information and we'd give it to them in a decrypted form. We
6 wouldn't even make them go through the trouble of figuring out
7 how to decrypt it. So if that was maybe, he was in no
8 position to say that, yes, faced with a request like that,
9 that the company would agree to that.

10 And if you're talking about folks like us, folks
11 who are not a reputable lab such as Consumer Reports, even
12 though what we do is far more in depth than what Consumer
13 Reports does, there's many maxims of jurisprudence. One of
14 those maxims of jurisprudence here in California, which is in
15 our civil code, is that the law does not require ideal acts. I
16 can tell you, that if I were to go to a censorware company
17 today or if Seth were to go to a censorware company today or
18 if certain other people were and say this is who I am, this is
19 why I want it, it would be the ultimate ideal act. They would
20 never agree.

21 MS. PETERS: So your answer is no?

22 MR. TYRE: If I remember the question, yes.

23 MS. PETERS: Can this problem be ameliorated
24 through private agreements?

25 MR. TYRE: In my opinion, no. First of all, I

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1 don't think the censorware companies ever would agree. And
2 second, if part of the agreement was an DNA, then what would
3 be the point? Our purpose is to expose the flaws.

4 MS. PETERS: Okay. One last question, I don't
5 want to hog it all. Mr. Metalitz said even if the case is
6 proved, the class is too broad and the focus is on censorware
7 and can you come up with a definition. Is it possible to come
8 up with a definition for censorware that distinguishes it from
9 the broader class of filtering software that would deal with
10 security and other things?

11 MR. TYRE: Well, I'm going to turn that around a
12 little bit. And I'm doing this not just as a lawyer's trick,
13 but because from the first moment I read Mr. Metalitz'
14 comment, I had an idea of what he was talking about but I
15 wasn't sure. I've asked a lot of people, not just other
16 censorware people, but computer security people who are among
17 my client list. And no one has been able to figure out exactly
18 what is meant by what Mr. Metalitz wrote and exactly what
19 definition, if any, would satisfy his request.

20 So I'm going to suggest to this panel that the
21 burden should not be on me or any other proponent of
22 censorware of this exemption to limit the proposed exemption.
23 The burden should be on Mr. Metalitz as the one who proposed
24 this amendment or limitation, or whatever you want to call it,
25 to specify in writing that can be analyzed as opposed to being

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1 just a theoretical construct exactly what it is that he does
2 or does not want. And your having indicated at the beginning
3 that there will be a chance for supplemental comments after
4 this is over, I think that's the appropriate forum to do that
5 in. I don't think it's appropriate today.

6 Again, not because I'm playing games, but
7 seriously because no one, including computer security experts
8 who are clients of mine, really understands it. I'm very
9 uncomfortable taking on the burden of trying to deal with it
10 at all before I see something more tangible from Mr. Metalitz.

11 MS. PETERS: Okay. Do you want to comment at
12 all?

13 MR. METALITZ: Yes. Sure. We have put something
14 in writing to say we think the filtering software that was
15 covered by the evidence that's been presented here, and it's
16 on page 13 of our joint reply comments. "Filtering software
17 used to prevent access to Internet sites containing material
18 deemed objectionable to children or otherwise inappropriate
19 for some segment of the public or for display in a public
20 setting."

21 Now, that may not be a very good definition, and
22 I would think that people who have the word "censorware" in
23 their name would have probably a sharper definition of what
24 kinds of material they're talking about. But the burden, of
25 course, is on the proponent throughout this proceeding and

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1 this panel can't recommend an exemption unless there's
2 evidence to support it that shows a substantial adverse impact
3 on the availability of something, some copyrighted work or
4 noninfringing purposes. So I would suggest that, you know,
5 we've taken a stab at it and I'm sure Mr. Tyre can do a lot
6 better. But we just think that whatever finding is made here
7 ought to conform to the evidence and not extend much more
8 broadly to get into areas that aren't covered by the evidence.

9 MS. PETERS: We may do a question. The way the
10 supplemental come in is if we actually come up with questions
11 that we believe we need further input from. So, we'll handle
12 it that way.

13 MR. TYRE: May I quickly respond to that?

14 MS. PETERS: Yes. Sure.

15 MR. TYRE: Certainly we can provide a more
16 precise definition of censorware. I don't have one in writing
17 in front of me, but that can be done. That's not the problem.

18 The problem is dealing with the other aspects of
19 what Mr. Metalitz proposes, and that these things other than
20 what would be defined as censorware. And one of the specific
21 reasons why that's a problem, is because there's been so much
22 consolidation in the industry, the relevant industry segment,
23 that it's not surprise that you have companies such as
24 Symantec which are offering integrated products which consist
25 both of traditional censorware and of firewall protection,

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1 antivirus protection things of that nature.

2 And what I'm asking for, I don't know whether
3 I'll get it, but what I'm asking for is something from Mr.
4 Metalitz that tells us how we deal with something like that,
5 how we deal with an integrated product. And further, how we
6 deal with what I would call a pure censorware company such as
7 N2H2 not suddenly grasping onto this newly limited category
8 and by making a few minor changes into its database, suddenly
9 turning itself into a company that in addition to doing
10 censorware has some minor security functions, some minor virus
11 protection. And all of a sudden because of however this
12 definition may work, finds itself because of imprecise wording
13 or any other reasons no longer subject to an exemption,
14 assuming of course that there's going to be an exemption at
15 all.

16 So I'm really troubled by all of this will play
17 out. And that's why, though I may not get my wish, I am
18 wishing that you will put the burden on Mr. Metalitz to give
19 us something far more concrete to consider than what has been
20 given.

21 MS. PETERS: I've basically hogged the
22 questions. So, David, how about you.

23 MR. CARSON: Let me just suggest to you, don't
24 assume we're going to put a burden on you or Mr. Metalitz. But
25 it would be in your interest to provide a more precisely

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1 defined class and what you would like to see if we were to go
2 in that direction.

3 I assume you're not saying that there is a
4 reason why people should be able to have access to lists of
5 what a virus swapping software blocks? Is that true or is
6 that of interest to you?

7 MR. TYRE: Speaking for myself and for the
8 Censorware Project, that is not of interest to us. Whether it
9 would be of interest to other security researchers, I have no
10 knowledge or comment.

11 MR. CARSON: Right. But they haven't come
12 forward in any event, so that's not really before us, I don't
13 think.

14 I'm not sure I've heard a precise answer to this
15 question, and I think it's perhaps an important one. Can you
16 tell us how people have since October 28, 2000 been taking
17 advantage of the exempted class for compilations of consisting
18 of websites blocks by filtering software applications?

19 MR. TYRE: That's an easy question to answer and
20 it's a difficult question to answer because there's not really
21 a whole lot that I can say about that that wasn't already said
22 in Washington.

23 MR. CARSON: Well, not a whole lot was said,
24 unfortunately, in Washington.

25 MR. TYRE: I'm quite well aware of that. I have

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1 gone through that transcript more than once.

2 Mr. Burt contends that Mr. Finkelstein hasn't
3 even done the work that he says he's done. I personally got a
4 rather large chuckle about Mr. Band's comment about the Iraqi
5 Information Minister. I sincerely hope that this panel does
6 believe that Mr. Finkelstein has, in fact, done what he says
7 he has done. And I've told you straight out that some of what
8 I've presented to you today is based upon the work that Mr.
9 Finkelstein has done, and that specifically decryption work of
10 N2H2, not other work that has been done.

11 There really isn't a great deal that I
12 personally know of that has been done in the last 3 years, but
13 I think there is a couple of reasons for that. And I think
14 there's also a quick response I want to make that's related to
15 that to one of the remarks that Mr. Metalitz made in the
16 beginning. And that is that I believe he has incorrectly
17 stated what the appropriate considerations are for the
18 Copyright Office and for the Librarian of Congress.

19 There's no doubt that what has or has not been
20 done in the last 3 years is a relevant factor. You'll never
21 hear me say otherwise. But Mr. Metalitz indicated in his
22 opening statement today that that's the only relevant factor.
23 I believe that's incorrect, both from reading the statute and
24 from reading your notice of inquiry, I believe that regardless
25 of whether it's an exemption that never has existed or it's a

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1 request to in effect renew an exemption that already has
2 requested, such as this one, the focus is the same. The focus
3 is "in/or," in either or not an "and". Either what has
4 happened before or what is likely to happen in the future.

5 MR. CARSON: Could I stop you for a second? Do
6 you dispute that, Mr. Metalitz?

7 MR. METALITZ: If I understand what Mr. Tyre is
8 saying, no I would not say that what is actually occurring now
9 is the only relevant factor. But Congress said that should be
10 the main focus of this proceeding.

11 MR. CARSON: So you don't dispute -- I'm sorry.
12 Go ahead.

13 MR. METALITZ: And now that the prohibition is
14 in effect, I think it's highly relevant what use is being made
15 of it.

16 MR. CARSON: But you don't dispute that at least
17 in theory, even if nothing were happening now, if we could
18 predict that it's more likely than not that in the next 3
19 years it's going to happen, it's perfectly relevant for us to
20 come up with an exemption if that's where it takes us?

21 MR. METALITZ: Yes. If it meets the criteria
22 that are in the statute and legislative history. And I think
23 you've spelled them out in the conclusion in 2000 what the
24 burden would be in that situation.

25 MR. CARSON: Okay.

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1 Sorry for interrupting you. I just wanted to
2 clear it up. Please go ahead with your --

3 MR. TYRE: That's quite all right. It was
4 useful.

5 Now, let's get back to that. I cannot cite to
6 you any specific examples that are not already in the record.
7 I'd love to be able to, but I'm not going to make up facts
8 that don't exist. What I can tell you is that there's sort of
9 a unique dynamic that's at play here, and this was not really
10 discussed at the Washington hearing.

11 This whole exemption has many unique qualities
12 about it, not the least of which it's one of the two
13 exemptions that you granted to 2½ years ago. Most of the
14 proposed exemptions that were requested then were rejected.
15 And so this is one that at least to some extent has had the
16 opportunity to be field tested.

17 But you've heard a great deal of testimony
18 already about how hard this work is. And I'm not talking
19 about what's been said about the legal risks involved. I'm
20 talking about that this is extremely difficult work to figure
21 out how to decrypt these programs in the first place. This is
22 not work for an amateur. This is work for trained
23 professionals who focus specifically on knowledge of
24 cryptography. There aren't a whole lot of people who are
25 capable of doing this kind of work, and it's a continuing arms

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1 race as one version of the program gets decrypted, then the
2 censorware companies respond as you would expect them to.
3 They make better encryption so then you need more skill to
4 decrypt it. It's hard work. It's time consuming work.

5 I cannot say this of my own personal knowledge,
6 but having gone through this with people who have figured out
7 how to decrypt this - Seth being one of them, not the only one
8 - I have pretty solid knowledge of how much is involved in
9 doing this.

10 Given how hard the work is, there's another
11 factor that comes into play here. Sure, it's true that this
12 exemption has been on the books since October of 2000. But 2
13 months later or 3 months later in December 2000 CIPA was
14 passed, the Children's Internet Protection Act. And with, I
15 believe -- I'm not even sure if it was the day after the
16 legislation was signed. It may have even been the day before
17 it was signed. I don't recall, I don't care. The twin lawsuits
18 by the American Library Association and the ACLU were filed
19 challenging the constitutionality of CIPA. And those lawsuits
20 were on a fairly fast track. You know they went to trial. You
21 know they were decided. Approximately a year ago the three
22 judge trial court found that CIPA was unconstitutional as
23 applied to public libraries. The matter since has been argued
24 in the Supreme Court. And at some point before you make your
25 final rulemaking, the Supreme Court presumably will decide

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1 that case.

2 I make no prediction on what that decision will
3 be. But I think it plays an important psychological dynamic
4 here because everyone has said on both sides - Mr. Burt said I
5 think, I know Mr. Band said it, I know Mr. Finkelstein said it
6 - that what does or does not happen in the CIPA case will have
7 an impact on how this work is done in the future. And by that
8 I mean specifically decryption work where you can get into
9 some of the in depth things such as the loophole sites that
10 you cannot get into simply by doing database querying or log
11 file analysis.

12 The people who do this do this in their spare
13 time. They put in an awful lot of time to do it. And there
14 has been a feeling on the part of those people, myself
15 included, that is it really worth investing a lot of time now
16 when this major court case is out there and this major court
17 case may have a huge impact on what the relative value of this
18 work is in the future. That's a psychological issue. That
19 may or may not resonate with you, but it's a real issue. That
20 issue that CIPA became law and was challenged in the court
21 within a few months of when this exemption came to effect is
22 one of the reasons why there hasn't been a lot of this work
23 done in the last 2½ years. But by the same token, knowing
24 that the Supreme Court will be deciding the case within the
25 next month or at least in theory it should be - I'm certainly

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1 not going to tell them what to do - that there is a good
2 likelihood, which is the standard, that once the CIPA case is
3 decided and we know again where the landscape is that those
4 who have been in the field, those who may be interested in
5 getting into the field will resume their work.

6 MR. CARSON: I'm going to follow up on a
7 question that the Registrar asked you with respect to the
8 experience of getting access voluntarily from the censorware
9 suppliers to those lists. Have there been cases where the
10 Censorware Project or people in a similar situation have tried
11 to get access to those lists and it's been flat out refused?

12 MR. TYRE: I'm sorry. I did not hear the last
13 part.

14 MR. CARSON: Have there been cases where the
15 Censorware Project or people in similar situations have
16 requested access to lists of blocked websites and that access
17 has been refused?

18 MR. TYRE: Yes.

19 MR. CARSON: Okay. Give me some idea of the
20 nature and quantity of those attempts?

21 MR. TYRE: Well, you already have in the record
22 that N2H2 flat out turned down Seth Finkelstein once.

23 MR. CARSON: Yes, that's once.

24 MR. TYRE: Once.

25 MR. CARSON: I'm trying to get a sense of

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1 quantity of the problem, the nature of the problem.

2 MR. TYRE: There was a time when I tried to get
3 one and, honestly, I'm blanking on which product it was. There
4 are so many of them, they sometimes blend together. And they
5 turned me down.

6 A lot of times you can get it the first time
7 because a lot of times you can get it the first time because
8 their system is automated. You give them legitimate
9 information, 2 minutes later you're eligible to download it,
10 you download it. It's the second time that's the problem.

11 You do it the first time, then we go out and we
12 do a report. You do it a second time, no. They'll not give it
13 to you. Sometimes there are other ways of getting a hold of
14 it. But if you ask for it, will they give it to you? No.

15 MR. CARSON: And you're telling us that based
16 upon a single experience of Mr. Finkelstein and a single
17 experience by you, is that correct?

18 MR. TYRE: Two experiences plus having dealt
19 with all these companies and knowing that particularly after
20 we've done a particularly scathing reporting on them that if
21 we asked for it again, they'd just laugh at us.

22 MR. CARSON: And the two specific experiences
23 were both with a single company, N2H2, is that correct?

24 MR. TYRE: No.

25 MR. CARSON: Oh, I'm sorry. Mr. Finkelstein was

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1 with N2H2 and yours was with?

2 MR. TYRE: Yes. I apologize for not remembering
3 which mine was with. There's been a lot of consolidation in
4 the industry and I'm not specifically remembering what it was.
5 But I will state for a fact that it was not N2H2. I have never
6 made that request of N2H2.

7 So we have two instances, two companies and I'd
8 be willing to make a rather substantial wager that that
9 doesn't answer your question. But if I were to go ask the
10 other companies, I'd know what the answer would be.

11 MR. CARSON: So you're asking us to make
12 judgments based upon your prediction, based upon your
13 experience?

14 MR. TYRE: Oh, no. I know to a moral certainty
15 what the responses will be. I'm not asking you to --

16 MR. CARSON: You think you've shown us two moral
17 --

18 MR. TYRE: I'm not asking you to take that as
19 evidence.

20 MR. CARSON: Okay. All right. Thank you.

21 MS. PETERS: How about going to Steve.

22 MR. TEPP: Okay. Thank you.

23 Just sort of following on what we've already
24 been talking about, Mr. Tyre, when we were in Washington Mr.
25 Finkelstein was asked about how many people take advantage of

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1 this exemption. And notwithstanding your comments about the
2 CIPA case and whatever chilling effect you think that has, you
3 made a comment about the limited number of people who have the
4 technical skills to do this given the level of detail of
5 knowledge that's required.

6 Mr. Finkelstein told us he thought about 6
7 people were using this exception. Do you think that the
8 number -- needless to say, that's an extremely small number
9 given the population of the United States. What it in your
10 estimation is the number of people who are capable and
11 interested in doing this so that, for example, if the CIPA
12 decision goes the way you and your colleagues would like what
13 should we expect to see in the next 3 years should this
14 exemption be renewed?

15 MR. TYRE: I'll give you somewhat of an
16 anecdotal example to that. I've been involved in a number of
17 the DMCA lawsuits, including the 2600 cases in Amicus and the
18 Felton case as one of the attorneys for Ed Felton and his
19 researchers at Princeton and Rice. I've done a lot of
20 speaking on DMCA. And it's reasonable to conclude that my
21 views on the DMCA do not coincide with those of Mr. Metalitz.
22 But we're not here to talk about that today.

23 What I think is absolutely fascinating is that I
24 believe there's a conference called Crypto which takes place
25 on an annual basis in Santa Barbara. It is considered by many

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1 to be the leading conference of cryptographers in the world.
2 People come from all over the world to that conference. Of
3 course, one of the reasons why it's in late summer in Santa
4 Barbara and it's hard to find a better place to be at that
5 time of year, but still the talent that is assembled there is
6 extraordinary. That's your class of the people who could get
7 into this field if they wanted to get into this field.

8 When I was there speaking one of the persons
9 there, a nationally known expert on computer security, Matt
10 Blaise came up to me afterwards and said to me "Wow, Jim,
11 you're my hero." Not because of anything I had done because
12 of the DMCA, but because of my Censorware Project work. I
13 didn't have the heart to tell him that I wasn't the person who
14 was actually doing the decryption. I do not have those
15 technical skills, as I've said before. But he found, and quite
16 a number of people at that conference, were more interested in
17 talking with me about censorware decryption work than they
18 were about talking with me about DMCA. Because DMCA is just
19 lawyers and cryptographers don't want to talk to lawyers. They
20 want to talk to people who are doing work. And I've got these
21 cryptographers who are world famous cryptographers coming up
22 to me and saying tell me about censorware. What can we do?
23 How can we help? Is this something that we can get into?

24 Will any of them actually do it if the exemption
25 is renewed for another 3 years? I don't know. If it is, oh, I

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1 can put together a very long list of people who I would want
2 to talk to if I wanted to expand the field of people who have
3 the appropriate skill set to learn how to do this and to get
4 involved in this. Because we could use more than those we
5 have.

6 MR. TEPP: Okay. Well, just to get a sense of
7 the value of your anecdote, how many people come to this
8 conference in Santa Barbara on average?

9 MR. TYRE: Several hundred minimum, maybe more.
10 When I did my speaking gig there we were in an auditorium that
11 I would guesstimate sat about 200. The house was packed,
12 standing room only. They hadn't come to listen to me talk
13 about censorware. They came to listen to me talk about the
14 DMCA at this particular session. But was the sole purpose of
15 that session. So there had to be at least 250 to 300 people
16 in that room, and they were maybe not from every single
17 continent on the world, but most of them.

18 MR. TEPP: Okay. Thanks.

19 One other thing in a similar sort of vein, you
20 referred earlier to how the reports that have been done almost
21 invariably result in one of the companies whose product is
22 being analyzed making corrections in line with the critique in
23 the reports. Can you give us a sense of how many reports have
24 been done in the last 3 years, or more precisely since October
25 29, 2000.

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1 MR. TYRE: Okay. Yes. Zero. If that's precise
2 enough for you.

3 We haven't done it, in large part, for the
4 reason that I mentioned. Seth is not the only member of the
5 Censorware Project and as I've indicated he is a former
6 member, he has not been a member since before October 2000 or
7 anytime in 2000, who is capable of doing this kind of work but
8 for the reason that I mentioned that there has been a feeling
9 that given the focus on the CIPA case that there is maybe not
10 the energy level that there was to continue doing these kinds
11 of reports. Given the energy that's involved in them, given
12 the time consumption that's involved in them we haven't done
13 any.

14 Will that change once CIPA is decided and if the
15 exemption is renewed? I think it will. I believe strongly that
16 it will. But our last report, which happened to be on Mr.
17 Burt's company N2H2 was in 2000 but probably -- it was in
18 2000. I'm not certain when in 2000 it was. It may or may not
19 have been after October 2000. But with that one qualification
20 we have not done any.

21 MR. TEPP: Okay. Thank you.

22 One last question, this one for Mr. Metalitz.
23 Looking at the opposite side of the equation, the potential
24 harm done to right holders over the past 3 years and should
25 the exemption be renewed prospectively in the coming 3 years,

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1 when we look at the situation that's been described you talked
2 about the burgeoning number of copyrighted works available on
3 the Internet; Mr. Tyre's talked to us about the explosion of
4 the number of sites on filtering lists and there appear to be
5 several filtering companies, it doesn't appear to be at first
6 blush to be an industry in distress. Can you comment for us
7 about what, if any, harm there might be should this exemption
8 be renewed for the coming 3 years?

9 MR. METALITZ: In terms of the health of the
10 censorware industry, I'm not sure I can add anything to what
11 Mr. Burt has submitted in his testimony. He's much more
12 knowledgeable about that than I am. I'm not sure that the
13 balance sheets of the particular companies or whether they've
14 consolidated or not is necessarily the right test. But I don't
15 have any information really that would shed much light on that
16 with regard to the censorware companies.

17 MR. TEPP: Or does it have any effect on the 17
18 entities that you're representing today?

19 MR. METALITZ: I'm not sure if any of the
20 companies that are involved here are members of any the
21 associations that I represent. To my knowledge, they are not.
22 So I don't know that it has any direct impact on them. And I
23 think I'm not really the person to ask about that.

24 MR. TEPP: Well, you're the closest we've got
25 today, so I thought I'd give it a try. Thank you.

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1 MS. PETERS: Okay. Thank you.

2 Rob?

3 MR. KASUNIC: Okay. I have just a couple of
4 questions, mostly for Mr. Metalitz. Mostly we haven't heard
5 him talk as much. And in the interest of time I'm going to
6 sensor myself today.

7 MR. TYRE: You can't do that. You have to speak
8 freely.

9 MR. KASUNIC: Mr. Metalitz, you had mentioned
10 that this is a net calculation and we do have to look at the
11 overall balance. And in line with that last question just so
12 we're absolutely clear, if we do find any evidence of more
13 than de minimis harm that then we would looking to what the
14 adverse effect on the industry would be. And one thing we do
15 have in the record that was in N2H2's annual report was that
16 this exemption final rule will not effect the value of lists
17 of blocked websites. So that there's a statement that this
18 would have seemingly no adverse effect on the value of these
19 sites. There's nothing else to add in terms of what harm the
20 exemption has had or is likely to have in the next 3 years?

21 MR. METALITZ: Well, I think you're using harm
22 to the industry as a shorthand for the statutory standard,
23 really, which has there been any adverse impact on the
24 availability of this copyrighted material for noninfringing
25 purposes. And I think the record shows that a lot of this

1 material is available for the noninfringing purpose that Mr.
2 Tyre wants to promote or at least a close cousin of that
3 purpose. Because the record shows that a lot of evaluations,
4 criticism and comment about these products has taken place.

5 Now, I don't say that it's possible there could
6 be more of that criticism, comment of that noninfringing use
7 that we're talking about if the exemption were extended. But
8 this really gets into the question of to what extent has the
9 exemption contributed to that availability.

10 Obviously, the health of whether the extension
11 of the exemption or the renewal of the exemption would have a
12 specific impact on the bottom line of a particular company is
13 a somewhat different question. They obviously could be
14 related, and I don't really know what significance to ascribe
15 to the statement that you just read that came from one of
16 their securities filings. That partly would have to do with
17 how diversified their business is, and I just frankly don't
18 know the answer to that question.

19 MR. KASUNIC: Okay. Well, in line with that then
20 in your reply comment you state that we should be looking at -
21 - and this is a follow up on what Mr. Tepp was asking - how
22 many members of the public, how often and how frequently and
23 how much they expect to utilize this in the next 3 years. But
24 given the limits that may be placed on harm and probably the
25 very small number of people who could accomplish or make use

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1 of any recommendation we make to continue the exemption, what
2 possibility of adverse effect would you foresee in the next 3
3 years that we haven't seen in the last 3 years?

4 MR. METALITZ: Well, I think you maybe -- if I
5 can suggest, you might be looking at this through the wrong
6 end of the telescope. I think the question is if the
7 exemption is allowed to come into force -- excuse me. If the
8 prohibition is allowed to come into force for these products,
9 for these works, which it has never done because the Librarian
10 issued an exemption on October 28, 2000; if the exemption
11 comes into force, will it have a substantial adverse impact on
12 the availability of this material for noninfringing uses? I
13 think that's the question that's before you. And only if you
14 find that it will have a substantial adverse impact, can you
15 justifiably extend the exemption.

16 Now, the number of people who can do it and how
17 often they do it, and what use they make of the exemption is
18 relevant because Congress said if you find that the adverse
19 impact is de minimis, then you should not recommend an
20 exemption. It doesn't necessarily mean that if only six
21 people can do it, is necessarily de minimis. But I think it's
22 a factor that you would want to take into account.

23 MR. KASUNIC: But isn't the question there
24 whether the adverse effect is causing an adverse effect on
25 noninfringing uses?

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1 MR. METALITZ: Yes.

2 MR. KASUNIC: Not on whether people if there is
3 an exemption they will be able to accomplish it? If this is a
4 theoretical exemption anyway in some instances, if so many
5 people will not be able to accomplish, take advantage of the
6 exemption because of the technological savvy that would be
7 required to effect the exemption, can we use that
8 technological hurdle as a barrier to finding the exemption in
9 the next 3 years?

10 MR. METALITZ: Well, I think the problem with
11 that reasoning is that it seems to say that the stronger the
12 encryption, the lower the bar to recognizing an exemption. If
13 you had an encryption that only two cryptographers in the
14 world were competent to break, does that necessarily mean that
15 the harm of recognizing an exemption be de minimis? So I
16 don't think it really correlates necessarily with the number
17 of people who are able to do it.

18 I think the focus has to be on what substantial
19 diminution of the public's access to or the availability of
20 this material for noninfringing uses is attributable to
21 1201(a)(1) as a causation element in here as well. And if in
22 fact it only impedes a very few people from taking an action
23 that, according to the testimony today, hasn't resulted in any
24 reports that would fall within this category of noninfringing
25 during the past 3 years, then I think that's a relevant issue

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1 for you to look at in deciding whether the statutory standard
2 has been met.

3 MR. KASUNIC: Well, the last thing I just want
4 to clarify, I raised this in Washington but since it was in
5 your reply comment, I just wanted some clarification.

6 What authority do you believe that we have that
7 -- at one point of your reply comment you mentioned that if we
8 do find an exemption, it should be limited in some way. And
9 where do you find that we have authority either placing
10 conditions on an exemption such as requesting permission from
11 the company beforehand, how would that be possible in terms of
12 designating a particular class of work that we could fashion
13 such conditions or such limitations on the exemption?

14 MR. METALITZ: That's a big question that I'm
15 sure we'll be returning to during the day and tomorrow. I
16 think the primary way in which this exemption if you decide to
17 recognize it, ought to be limited is by shaving down the
18 category of works to which it applies so that it only applies
19 to censorware, whatever the right definition of that is and
20 I'm sure Mr. Tyre can do a better job than I can of giving you
21 one, and that it not apply to all these other types of
22 security related and other lists of websites that would appear
23 in filtering software.

24 Now the reply comment does mention this issue of
25 consent or whether there's a likelihood that access to this

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1 information would be granted or whether there's in effect an
2 exhaustion requirement that someone using the exemption would
3 have to first ask for permission. I think that's probably
4 better looked at in terms of trying to decide whether there's
5 a basis for an exemption at all. And the testimony I heard,
6 and I don't know that this is correct, that basically it's
7 very easy for someone to get at least one free bite at this
8 database without going through decryption. It seems to
9 relevant to me and it indicates that perhaps means other than
10 an exemption would help to cure whatever adverse impact you
11 find in this area. But, obviously, that's a contested issue
12 before you and people's views are going to differ on it. But
13 I think that that's where that evaluation would best fit.

14 MS. PETERS: Okay. Thank you.

15 Charlotte, do you have a few questions.

16 MS. DOUGLASS: I do.

17 MS. PETERS: Okay.

18 MS. DOUGLASS: I have one question here, Mr.
19 Tyre, and one to Mr. Metalitz.

20 We talked a little bit, a lot actually, about
21 whether or not it would make any sense to request permission
22 from different companies because you wouldn't be able to get
23 it. It seems to me that when we met in April there was talk
24 from Mr. Burt of probably maybe an industry wide agreement or
25 an industry wide consensus that there might be a possibility

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1 that they would be in a position to give you the lists. But
2 you've read the testimony as well. Is it your sense that an
3 industry wide agreement would be also as useless as asking
4 company by company. If for example, Mr. Burt represents a
5 number of say the nine big -- did that make any sense to you?

6 MR. TYRE: I do understand the question.

7 MS. DOUGLASS: Okay. Okay.

8 MR. TYRE: And with respect, I think it slightly
9 misstates what he said.

10 MS. DOUGLASS: Okay.

11 MR. TYRE: And I actually can't see if he's
12 sitting here behind me or not, but I almost hope that he is.

13 MS. DOUGLASS: I don't see him.

14 MR. TYRE: But first off, he make it very clear
15 that in this context he was speaking only about his own
16 company, N2H2. He was not speaking about either of the two
17 companies that joined him in the joint reply, 8e6 Technologies
18 and Be Safe Online. And he certainly was not speaking on
19 behalf of any of the various other censorware companies such
20 as WebSense, SmartFilter, SurfControl. WE've all heard the
21 list beforehand.

22 What he said, as I understand it, is that
23 they've had some internal discussions, never resolved, within
24 N2H2 that maybe if a reputable research organization such as
25 Consumer Reports came to them and maybe if they agreed to an

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1 NDA, and maybe if they agreed to certain other factors, then
2 they would let them have it.

3 MS. DOUGLASS: Okay.

4 MR. TYRE: There is zero chance on the face of
5 the work on this earth that regardless of how reputable I
6 might be in your eyes or in anybody else's eyes, that Mr. Burt
7 would consider me to be reputable. There is zero chance that
8 I would agree to sign an NDA. Because what's the point of it
9 if I sign an NDA? That's a nonstarter.

10 MS. DOUGLASS: Okay. Thank you for clarifying
11 that.

12 Now, Mr. Metalitz, if an entire community of
13 users consisted of a group, say, of about ten people all of
14 whom sought to do what was more or less clearly noninfringing
15 work and they all experienced the same problem, would you say
16 in your estimation that this ten person group is an
17 insignificant number by definition or could this be in light
18 of the importance of the indispensability of the research that
19 they're doing and the entirety of the community, could be
20 that be considered?

21 MR. METALITZ: I don't think there's any litmus
22 test or any magic number below which it's automatically de
23 minimis. I think you have to look at the type of
24 noninfringing use that they're talking about. And my
25 impression, anyway, is that they're really talking about

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1 criticism and comment, the types of reports whether they're
2 formal reports or not or critiques of these various products.
3 And I think that output is probably what you should be looking
4 more than the number of people that have contributed to the
5 output. But, again, this type of fair use, and I'm assuming
6 this is fair use, like any type of fair use for purposes of
7 this proceeding is not necessarily the case that the goal
8 needs to be the preferred or optimal means of access in order
9 to make fair use of the material. So you have to consider
10 whether this is sufficiently available through other means
11 that don't require conduct that's covered by 1201(a)(1) in
12 order to justify the exemption. I don't think there's any
13 magic number or any per se rule that would flow from that.

14 MS. DOUGLASS: Sure. I was just getting at the
15 sort of numerical calculus.

16 Thank you very much.

17 MS. PETERS: Okay. Comment?

18 MR. CARSON: Yes. Just wanted to clarify
19 something.

20 I didn't mean to be unfair to you, Mr. Tyre. So
21 the comment I made about how you perhaps ought to think about
22 and get back to us with a more strict definition of what
23 censorware is or what it is that you want us to exempt aside
24 from the current one, which is this list of websites that are
25 blocked by filtering software. But the same goes for you, Mr.

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1 Metalitz. You're the one who is proposing we narrow it down.
2 I think it would serve your interests if you come up with the
3 best definition you can come up with with what you think we
4 ought to be narrowing it down with, understanding that when
5 you're doing that you're not necessarily asking us to exempt
6 anything at all, but if we're going in that direction what is
7 it you want. We'll look at what you've both given us and
8 we'll decide whether to do anything, and if so how to narrow
9 it down, if at all.

10 MR. METALITZ: We'll certainly do that.

11 MS. PETERS: Thank you very much.

12 The first panel is concluded. We'll take a 10
13 minute break and be back starting at 11:15. We're already
14 significantly behind.

15 (Whereupon, at 11:05 a.m. a recess until 11:23
16 a.m.)

17 MS. PETERS:

18 The second panel is looking at literary works,
19 malfunctioning, damage, obsolete technological protection
20 measures and issues related to research and security.

21 And the panel is Brewster Kahle representing the
22 Internet Archive, Barbara Simons representing the Association
23 of Computer Machinery, George Ziemann representing --

24 MR. ZIEMANN: I would this time say that I'm
25 just representing myself.

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1 MS. PETERS: Okay. All right. Fine.

2 And Steve Metalitz who was on the last panel
3 representing the Joint Reply Commenters of a large number of
4 copyright owners.

5 And we're going to go in that order. And because
6 of time difficulties, I'm going to say for the beginning round
7 -- try. I'm not saying you must. Try to restrict your
8 comments to 10 minutes in the opening round. Okay.

9 Let's start with you.

10 MR. KAHLE: Thank you for inviting us down.
11 Appreciate the opportunity to be here.

12 My name is Brewster Kahle, I'm the digital
13 librarian and Chairman of the Board of the Internet Archive.
14 It's a 501(c)(3) nonprofit library located in San Francisco.
15 We really concentrate on digital works. So the issue is about
16 preserving digital works. We're open to academics,
17 researchers, scholars and the general public. Some of our
18 collections are available over the World Wide Web, but at
19 least all of our collections are available for those that come
20 to our facilities and our libraries to do things in-house that
21 often cannot be shown over the World Wide Web.

22 All of our services are available for free.

23 There's no fee for anybody to use this. And we're open to the
24 general public.

25 We maintain a broad collection, including

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1 websites, website movies, books and digitized books both,
2 musical holdings and a growing collection of software, which
3 is the subject of the conversation today.

4 Researchers come from all over the world to
5 learn about digital archiving, so we have sort of a research
6 focus in that way, but also doing the real work and people
7 come to use the collections in our facilities.

8 We're supported by foundations Sloan, Markel,
9 Kale Austin Foundation, government, Library of Congress,
10 National Science Foundation in kind donations HP, Amazon. So
11 in some of the replies and back and forth, there's a little
12 sort of who are you, and so I hope that that sort of gives you
13 an idea.

14 This is what we look like, our building in San
15 Francisco, some of the people that are working on preserving
16 the materials, and this is a fellow doing work at one of the
17 public access terminals.

18 The problem that this is all about, is basically
19 media is degrading. Formats become obsolete and the platforms
20 change. It makes our job as librarians to record our digital
21 cultural heritage extremely difficult. And we're doing our
22 best to adapt our profession, our field to be able to take the
23 materials that are not just digitized materials that are now
24 in our holdings, but also things that were born digital and
25 born to not necessarily last the ages. They're born for a

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1 particular commercial exploitation and then they go into our
2 hands. And that's the sorts of works that we mainly try to
3 deal with.

4 Preserving these things are really important. I
5 got somebody last week, the staff, so what, who cares about
6 this stuff? And I think it's critically important. Tens of
7 thousands of people spend 20 years, so since the PC came out
8 there's been a proliferation of commercial packaged software
9 in games, CD-ROMs that really sort of bring software and
10 content together and it's been a new expressive media, but
11 also really great stuff is in. So it's not just to look at
12 history, it's actually pretty nifty material.

13 We've been learning a lot about how to preserve
14 these, and it's a fairly new field the whole digital
15 preservation area. In fact, the Library of Congress thing is
16 really to push this thing forward. We've found that it's
17 critical to both copy the materials and to gain access to the
18 materials to be able to do preservation. Without copying and
19 creating access, even if it's in-house access for researchers,
20 historians and scholars, we're out of luck. Many of us
21 probably had experiences going and backing up software and
22 thinking that we're all safe. And then when you turn back to
23 it, it turns that it wasn't there in the first place. So we
24 think it's important.

25 What I'm here to talk about two exemptions on

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1 the 1201(a)(1). The first is a literary and audiovisual works
2 embodied in software whose access control systems prohibit
3 access to replicas. So that was our first major one. We
4 think of it as a very narrow exemption, it's these sort of
5 software titles on a very specific project.

6 The other exemption is literary works including
7 computer programs, databases protected by access control
8 mechanisms that fail to permit access because of malfunction,
9 damage and obsolescence. This is a much broader exemption
10 which is starting to become useful in certain circumstances.
11 And so I'd like to speak on both of those areas.

12 I thought a quick sort of overview, and quick is
13 the operative word here, of some of the titles that we have
14 here. So this is Apple Writer II. If you remember floppies
15 that look like this. When was the last time you tried to read
16 a floppy like this, though? They're non-trivial. This is
17 Apple Writer 1.1. The National Archives are starting to get
18 digital materials from the White House, for instance. And if
19 we don't go and save things like Writer Apple 1.1, then we may
20 have troubles in the future.

21 DOS. It's IBM original DOS. These are some of
22 the early programs that were done by amateurs. This is an
23 interesting title because it's when the convergence of the
24 personal computer and the film industry happened; when
25 Ephemeral Films is a seminal title off the Voyager CD-ROM

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1 collection.

2 Lotus 123 that really propelled the whole
3 personal computer.

4 Just slipping through just some of the materials
5 that we have. This is when we tried to get text on computers.
6 This is "Shogun" is one of the first trying to do books and
7 computers together. Kind of clunky, but important for people
8 seeing the progress. If we can't have access to the actual
9 software and just the packaging, that would be tragic.

10 Early Quicken.

11 VisiCalc came before 123 and was the first
12 spreadsheet program. I feel quite honored to be able to even
13 hold one of these packages into my hand. It's a sealed
14 package, never opened of VisiCalc.

15 Tetris, the original Tetris. Soviet Challenge,
16 original works.

17 Simms City, when we first started to have
18 simulation in the educational environment. Now simulation is a
19 basis of a lot of work in high school and junior high school.
20 But this work is absolutely seminal in its worth.

21 One of the questions is, is do we do in terms of
22 being able to support these and be able to use them.

23 Robocop 3 is interesting because its content is
24 a 3D immersive, but it's also got that famous dongle problem.

25 This is, I guess, the access control that was really talked

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1 about a lot 3 years ago of making it so that we have bypass
2 those access controls to be able to make these available.

3 And this is sort of a chart of just 16 of these
4 titles. And what it is we're advised by our lawyers we're not
5 going to be able to save. We can save one of these 16, all the
6 rest of them have access control that make it so that as we
7 understand it we would be violating the law if we were to
8 circumvent the access controls to be able to preserve these
9 titles by making copies, which is relatively easy, and to be
10 able to access them and play them, make sure that we have them
11 in accurate form.

12 So, I find this tragic. These materials are
13 entrusted to us. These aren't easy to come by. And they're
14 rotting in our hands.

15 I'd like to hit a couple of comments that were
16 done by an esteemed colleague Steve and some of the other
17 comments and sort of try to answer a few of these.

18 First, preservation requires both copying and
19 access. If we do just one -- it's not like books. You know, it
20 used to be that you kind of put a book in a basement and go
21 back in 50 years and you'd still have a book in the basement
22 and you'd be able to read it. That's not the case with these
23 things. I mean, trying to get technology to work in the
24 current day is hard enough. Trying to get technology that
25 worked in the past is extremely difficult.

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1 The reply seen no evidence of damage. They
2 spoke in hypothetical issues that maybe if original access
3 controls could be circumvented that there might be problems. I
4 think we've got concrete areas where damage is happening and I
5 think we could move forward from that.

6 The uses that were talked about in some of the
7 briefs actually were done before 1201, so they were doing just
8 fine before 1201 so why do we think that things are happening
9 worse or better since 1201?

10 The use is still protected under the Copyright
11 law. We're regulated just like everybody else within the sort
12 of 108 work. We are a library. So the use is protected. While
13 we have done some copying of these materials, it's been with
14 signed, written permission from the copyright owners. And
15 those are a couple of the offerings that we had on our
16 website. All the rest we have not touched. And, actually, I'm
17 kind of scared of touching these. I don't know if we're ever
18 going to be able to read them.

19 The last point is what we're trying to do is
20 difficult. We're trying to go and resurrect these old
21 platforms based on emulation and other mechanisms. It's non-
22 trivial, so it's not for the light of heart. If this exemption
23 were out there, I don't think that we're going to have a flood
24 of hundreds of thousands of people going and doing this. But
25 by having these organizations, these libraries and archives do

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1 this, it can effect hundreds of thousands in the educational
2 and research domain that are trying to learn from our past
3 without damaging the market for those.

4 So we need both of these exemptions to further
5 our chance of preserving these, the narrower class, which is
6 the software embedded type materials and circumventing that we
7 think of as critical for these sorts of materials.

8 There were arguments about actually what we need
9 these are copy controls as opposed to access controls. Well,
10 there might be copy controls, but there seem to always be
11 access controls. And as I understand the law, it's very
12 straightforward. If we circumvent the access controls, we
13 lose. It's not that it's a fair use, there's not Section 108.
14 We just lose. And that means that we cannot preserve these
15 materials, and we're about to lose PC software and games.

16 This makes no sense. Time is not on our side.
17 These things are rotting. Stanford, the Internet Archive; a
18 lot of these materials came from Stanford, the Charles Babbage
19 Institute, the Computer History Museum; we all have
20 collections that are rotting in our hands.

21 We believe we know technologically how to
22 perform our job function. What it is is we need to be allowed
23 to do our job function and preserve these materials before
24 it's too late for future generations.

25 Thank you.

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1 MS. PETERS: Okay. Thank you.

2 Ms. Simons?

3 DR. SIMONS: I think that I was seated with
4 Brewster so that I would be made to feel at home. This is what
5 my desk usually looks like.

6 Good morning, Mr. Peters and distinguished
7 representatives of the Copyright Office. Thank you for the
8 opportunity to testify at this important hearing as part of
9 the Copyright Office's anticircumvention rulemaking
10 proceedings.

11 I'm Barbara Simons. I co-chair USACM, the U.S.
12 Public Policy Committee of the Association for Computing
13 Machinery.

14 ACM is the leading nonprofit educational and
15 scientific computing society of nearly 75,000 computer
16 scientists, educators and other information technology
17 professionals committed to the open interchange of information
18 concerning computing and related disciplines.

19 And I should also add, ACM is also a publisher.
20 We have a large digital library which is online.

21 USACM, which I founded in 1993, serves the ACM
22 membership and community by providing policymakers, courts and
23 the public with a deeper understanding of computer and
24 Internet issues and their convergence with legislative and
25 regulatory initiatives. I'm a fellow of ACM and of the

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1 American Association for the Advancement of Science, and
2 formerly served as President of ACM and Secretary of the
3 Council of Scientific Society Presidents. I earned my Ph.D in
4 computer science from a school up the road there, UC Berkeley.
5 Worked at IBM Research for many years. And have authored
6 numerous technical papers. I have been a consulting professor
7 at the University of California Santa Cruz and Stanford
8 University.

9 My statement today represents the views of the
10 USACM to underscore the importance of this rulemaking
11 proceeding to the computing community. My statement has also
12 been endorsed by the Computing Research Association, an
13 association of more than 180 North American academic
14 departments of computer science and computer engineering,
15 industrial academic laboratories and affiliated professional
16 societies.

17 USACM has found Section 1201 of the DMCA to have
18 substantial negative impacts on the conduct of basic research
19 in the U.S., particularly in cryptography and other computer
20 security areas. The section interferes with many legal,
21 noninfringing uses of digital computing and prevent scientists
22 and technologists from circumventing access technologies in
23 order to recognize shortcomings in security systems, to defend
24 patents and copyrights, to discover and fix dangerous bugs in
25 codes and to conduct forms of desired educational activities.

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1 The following are just a few illustrations of
2 legitimate activities currently prohibited by Section 1201.

3 A financial institution receives a digital
4 object protected by code obfuscation using means other than
5 encryption. Employees of the firm suspect it contains a
6 highly destructive computer virus or worm. The only way to
7 find out if these suspicions are valid is to circumvent the
8 obfuscation techniques to see what the code actually does.
9 Because the code including the possible virus qualifies as an
10 original work of authorship, the act of circumvention is
11 prohibited.

12 A contractor employs software technology from a
13 third party in a system widely used by law enforcement. In the
14 course of use the serious flaw or bug is discovered that makes
15 the system fail unexpectedly. The third party could be
16 unresponsive or, worse yet, suspected of being a front for a
17 crime organization not trusted to fix the software. Whatever
18 the case, because the software is protected as an original
19 work of authorship, no reverse engineering or circumvention is
20 allowed to fix the flaw in a trusted manner.

21 A firm wants to test a computer system before
22 purchasing it to ensure that it is trustworthy and secure or
23 to check for patent and license violations in the code itself.
24 Circumventing a technical measure without the product's
25 producer's permission is prohibited.

1 Scientists and educators are prohibited from
2 teaching many of the standard security techniques to
3 investigate security risks because these same techniques can
4 be employed to circumvent copyright protection mechanisms.

5 A copyright owner might suspect that a user is
6 infringing his code. The only way to test his assumption is
7 to bypass the encryption scheme of a suspected work to access
8 the material. Bypassing the encryption scheme is prohibited.

9 ACM submitted a declaration in the Felton case,
10 and I'd like to quote from part of that declaration because
11 those concerns remain all too relevant. This was written in
12 2001, so some of it refers to an event which has already
13 occurred but hadn't occurred then.

14 "Research and analysis, i.e. the evaluation of
15 the strengths and weaknesses of computer systems, is essential
16 to the development of effective security both for works
17 protected by Copyright law and for information in general.
18 Such research can progress only through the open publication
19 and exchange of complete scientific results. ACM is concerned
20 that Sections 1201 through 1204 of the DMCA will have a
21 chilling effect on analysis, research and publication as the
22 results of litigation itself or of the threat or concern about
23 potential litigation.

24 ACM is also concerned that application of the
25 DMCA to the presentation of publication of scientific papers

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1 could result in the departure from the U.S. of the information
2 security community for conferences and publications. If
3 conference organizers cannot afford to take the risk of
4 publishing papers, such as the papers ACM expects to be
5 submitted for its November 5, 2001 workshop as described
6 below, those conferences may be held in other countries where
7 the risk of liability is lowered. Such a result would have a
8 negative impact on this country's leadership in research in
9 that area.

10 ACM's particularly concerned about the potential
11 implications of the DMCA for its then upcoming November 5,
12 2001 workshop on security and privacy and digital rights
13 management, the DRM workshop. Part of the description of that
14 workshop states: "This workshop will consider technical
15 problems facing by rights holders who seek to protect their
16 intellectual property rights and consumers who seek to protect
17 their privacy and to preserve access they now enjoy in
18 traditional media under existing Copyright law."

19 Like many other ACM workshops, ACM plans to
20 publish the papers accepted for the DOM Workshop as
21 proceedings. ACM is concerned that the publication and
22 presentation of technical papers on many of these topics,
23 especially papers on watermarks, encryption, authentication,
24 access control systems and threat and vulnerability assessment
25 could raise problems under the DMCA. We are concerned that

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1 ACM along with its conference workshop organizers and member
2 authors will be open to the same threats and run the same
3 risks of legal liability as will Professor Felton, his
4 coauthors and organizers of the Information Hiding Workshop.

5 ACM is also likely to sponsor other conferences
6 that may be effected by the DMCA. Virtually all conferences
7 that discuss the security of digital information may be
8 subject to threats under the DMCA because such conferences
9 consider the strength and weaknesses of various technological
10 protection measures that could be applied or are actually
11 being applied to protect copyrighted works.

12 ACM has earned the reputation of choosing strong
13 scientific papers through a peer review process without regard
14 to political or commercial pressure. It's reputation as a
15 leading scientific and technical organization could be
16 substantially damaged within the scientific and technical
17 community if it failed to publish a properly submitted and
18 peer reviewed paper because of commercial pressure or the fear
19 of litigation. Any restriction that the DMCA may impose upon
20 the publication of the scientific research will keep foreign
21 researchers from attending our conferences in the United
22 States with a potential loss of ACM members and of revenue for
23 membership, conference participation and publication.

24 We are concerned that some of our members,
25 intentionally or not, may censor their submissions to avoid

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1 potential DMCA problems. If that were to happen, the quality
2 of the ACM papers and presentations would be hurt and the
3 scientific community as a whole could suffer substantial
4 damage.

5 Beyond the possibility of DMCA problems at the
6 November DRM workshop, ACM may continue to face potential
7 problems in the future. ACM has long published papers in
8 fields addressing the circumvention of security and technical
9 protection measures. Unbiased, objective research in the
10 fields of computer and data security has always included
11 research into the weaknesses, as well as strengths of security
12 measures. ACM could adopt a policy of steering clear of
13 papers that could subject it to liability under the DMCA, but
14 that could only be done at the risk of sacrificing its mission
15 and damaging its reputation as a scientific organization.

16 In sum, as long as Sections 1201 to 1204 of the
17 DMCA could be interpreted to reach scientific and technical
18 publications, ACM and its members are concerned they will face
19 a continued risk of litigation and liability."

20 That's the end of the quote from the
21 declaration.

22 Unfortunately, the concerns ACM expressed in the
23 Felton declaration are no longer hypothetical. A few days ago
24 in preparation for this testimony I posted a note to USACM
25 requesting personal experiences from people who have had

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1 problems with the anticircumvention provisions of the DMCA. I
2 received 3 responses, all of which are quoted below with
3 permission.

4 One of the people with whom I communicated is
5 Dutch computer scientist Neils Ferguson. Ferguson withdrew a
6 paper detailing weaknesses in the HDCP content protection
7 system from the very ACM DRM workshop referred to in the
8 declaration, and instead wrote a paper entitled "Censorship in
9 Action, Why I Don't Publish My HDCP Results Which Is Included
10 In Your Packet."

11 He also made the following comment to me in
12 email. "Since my experiences with my HDCP paper, I have
13 stopped doing research on the security of cryptographic
14 systems that protect copyrights. There is no point in doing
15 research if I cannot publish my results. I've spoken to
16 several other experienced cryptographers and many have come to
17 a similar conclusion. Of course, this lack of research almost
18 guarantees that the copyright protection techniques will be
19 easy to break and that works will be pirated for years to
20 come. We know from experience that systems designed without
21 public review are almost always weak. Without public review
22 there is no security and without security the pirates will
23 thrive."

24 A second communication was from Professor Dr.
25 Andreas Pfitzmann of -- I can't pronounce this -- Technische

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1 Uni versi tät i n Dresden. Professor Pfi tzmann was on the
2 program commi ttee of the Information Hi di ng Workshop at which
3 Professor Pfi tzmann was supposed to have presented his paper
4 ini ti ally. I now quote, and the English is because I think
5 he's a German speaker, so it's a li ttle bit not qui te correct.

6 "I do not know how much i nside knowledge you
7 have about the Fel ton which started the Information Hi di ng
8 Workshop which accepted that paper for a presentation where
9 not only Fel ton and his coworkers, but also program commi ttee
10 chair Ira Moskowi tz and general chair John McHugh has been
11 threatened personally. In a later case, the employer was
12 willing to take the legal risk. Finally it was mostly the
13 European members of the program commi ttee who voted to not
14 exerci se any i nfluence whether to present or not to present
15 that accepted paper, but to leave that deci sion completely to
16 the authors. And it was the decision to let no American share
17 the scheduled section for the Fel ton paper, but a European
18 citi zen, me.

19 For the workshop it worked out very well i n the
20 end by a lot of publi ci ty and probably this paper got even
21 during the workshop so many readers as no other paper. But
22 when accepting to chair that session, which I did not know
23 whether the paper would be presented or not, it was quite
24 clear to me that this could mean stayi ng i n the U.S. for quite
25 a while. Since I am working as an advi sor for the German

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1 government concerning privacy and security, I was quite
2 optimistic that it would work out well in any case for me
3 personally, since I expected so much help by Germany in the
4 EUS could be, but it somehow looked strange that mainly the
5 Europeans were in charge of helping to maintain basic
6 liberties, e.g., to speak about the freedom to discuss
7 research in the U.S.

8 After experiencing the threat to the Information
9 Hiding Workshop mentioned above, I would argue to exempt the
10 organizers, program committees and session chairs as well as
11 publishers assigned to the conferences and workshops. As long
12 as this is not done, we decided to avoid the U.S. for
13 Information Hiding Workshop, and I personally successfully
14 argued to hold the successor of PET 2003 not in the U.S., but
15 in Canada.

16 In addition, it caused me to argue to stay with
17 Springer Valic, a German publisher as the publisher and not
18 to switch to ACM with regard to PET 2004 as we wanted to stay
19 as far away from U.S. jurisdiction as possible."

20 The third communication was from Professor David
21 Wagner who was in the computer science department at UC
22 Berkeley.

23 "We looked at the HDCP, a copy protection system
24 designed for us in, I am told, high definition TV sets. We
25 very quickly found it had serious security flaws. We wrote a

1 paper and submitted it to a scientific workshop. Then we
2 realized that we were running right down the same path the
3 Felton group did and, hey, we'd better be careful.

4 I then spent the next 2 months on conferring
5 with our university lawyers checking out whether it would be
6 safe to publish our paper. As it happened, we got lucky this
7 time on 2 counts. First, the university agreed to indemnify
8 those of us at Berkeley against any civil liability if we were
9 sued. Kudos for the administration. I can't say enough good
10 things about them for their support of us.

11 Of course, the DMCA also comes with felony
12 prohibitions on certain violations, and we were on our own in
13 that respect. The university can't help with this criminal
14 liability. But civil liability was probably the more likely
15 risk.

16 Second, we talked with the engineers at Intel
17 who designed the HDCP and they turned out to have very
18 enlightened attitude about the whole mess. They thanked us for
19 our work and told us they would not sue us. Had this in any
20 other company, though, things might have turned out
21 differently.

22 Based on these two positive signs, we felt
23 comfortable enough to publish and our paper appeared in the
24 very same ACM Workshop on Security and Privacy and Digital
25 Rights Management 2001. We were very fortunate. Nevertheless,

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1 it was not a good experience. I spent more time talking to
2 lawyers than I did doing the actual research. We changed the
3 way we wrote our paper. We changed the way we interacted with
4 our researchers before our paper was published. And we wasted
5 a lot of time on the legal aspects.

6 The DMCA is troubling. After spending many
7 hours with lawyers examining the implications of the DMCA, I
8 personally have stopped doing work on copyright protected
9 systems due to the legal overhead and uncertainties. For
10 instance, the encryption research exemption doesn't cover
11 1201(b) activities along with all sorts of other oddities,
12 with which I'm sure you're very familiar. I cannot in good
13 faith ask students I advise to take on uncertain risks at this
14 time. I consider this a perhaps caution, but not irrational
15 response to the DMCA.

16 Yes, you may mention my name and all the
17 situations at the hearing. This is public information. In
18 fact, it was featured as a cover story in the *SIAM News*."

19 The fundamentally flawed approach of Section
20 1201 criminalizes multiuse technologies rather than penalizing
21 infringing behavior. During the current rulemaking proceeding
22 we urge that a distinction be made between circumvention for
23 the purpose of obtaining infringing access to a work and
24 circumventing for the purpose of developing new techniques to
25 protect computer systems and networks against attacks,

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1 negligence, malfeasance and vandalism or to advance the
2 continued innovation of software and digital computing.

3 USACM recommends that the Library of Congress
4 provide an exemption to Section 1201 that permits access to
5 and dissemination of information about computer programs and
6 databases that are protected by CTP access control mechanisms
7 in order to recognize shortcomings in security systems, to
8 defend patents and copyrights, to discover and fix dangerous
9 bugs in code and to conduct forms of desired educational
10 activities.

11 I would like to request permission to submit
12 additional material to my testimony later.

13 And I thank you for the opportunity of appearing
14 before you today.

15 MS. PETERS: Thank you.

16 Mr. Ziemann?

17 MR. ZIEMANN: Okay. First of all, I would like
18 to read -- if I send an email to the Copyright Office, what I
19 get back on the screen says "The mission of the Copyright
20 Office is to promote creativity by administering and
21 sustaining an effective national copyright system." And yet
22 today we are here to talk about how closely we are going to
23 define the scenario at the beginning of "Fahrenheit 451." We
24 already have the music police. We might just give firemen the
25 flame throwers, because that's what is happening.

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1 As a copyright owner I want him to have my
2 copyrighted material. I don't understand why anyone would not.
3 Then if so, why did they create it in the first place.

4 I would also bring up just the issue of what an
5 oxymoron the phrase "intellectual property owner" is. No one
6 owns intellectual property. They may the right to commercially
7 sell it. But once an idea is a book, that intellectual
8 property belongs to the world. E-MC² may have been Einstein's
9 theory, but we all own it now. John Lennon's "Day Tripper"
10 song, he wrote it, somebody owns the copyright. But if the
11 public didn't accept it as something that they wanted, it
12 would be worthless. It wouldn't matter.

13 And taking even just that example, a couple of
14 years ago I went to the Rock and Rock Hall of Fame and saw the
15 original lyrics to "Day Tripper." That is the copyrighted
16 work, I believe. That and the original sound master recording.
17 Not my copy of it, which I have one, is worth maybe \$5. It
18 worthless. But that piece of paper that it was originally
19 written on, even if it's in public domain now, is valuable.
20 It's worth more than any of the copies. Okay.

21 Mr. Metalitz is here to represent the
22 intellectual property owners. I would question: (a) how they
23 came into possession of so much intellectual property. They
24 certainly didn't create it all. They contractually took
25 possession of it. In the music business alone you cannot get

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1 a recording contract without relinquishing copyrights. You may
2 be able to if you're powerful and have some influence and can
3 get a special contract, but talk to any of the big people.
4 They don't own their music anymore. This does nothing for the
5 creators. It does nothing to promote creativity.

6 And then the next point I would like to make is
7 that the Copyright Office is on the verge of becoming as
8 irrelevant as the record industry. Okay. I can make my own CDs
9 now and sell them. I've done it. I don't need a record
10 company to do it or to promote it. Okay. They're no longer
11 necessary.

12 I've sent in a copyright, filled it out wrong.
13 And so I have to fill it out correct again. If I don't, you
14 won't register the copyright, but you'll still put a copy in
15 the Library of Congress. So that's all I wanted in the first
16 place. And so do I even need a copyright now? And if I do
17 get a copyright, I'm going to sell it for \$1 to Leonard
18 Lessing's Creative Commons Foundation so that no one else can
19 become the intellectual property owner of my copyright.

20 I don't see how the DMCA is doing anything for
21 any creativity anywhere. And if that's what the purpose of
22 the Copyright Office is, you're certainly not promoting
23 creativity any longer. And if you don't adapt, you too will
24 become irrelevant.

25 My next question is if this gentleman decides to

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1 go ahead and bypass copy protection, what are you going to do
2 to stop him? Nothing? You have no authority.

3 I would actually say that this entire hearing is
4 in a very appropriate venue. It is moot, and that's what we're
5 in the moot part.

6 And one other point that I would like to make is
7 in reference to how the DMCA is being used to twist things.
8 The record industry's big cry is how piracy is destroying
9 them. In the past 5 years the record industry, according to
10 the RIA statistics has given away enough free physical goods
11 to finance the war in Iraq. At a minimum it's \$2.5 billion
12 dollars a year.

13 The Internet came along and gave them an
14 opportunity for free promotion, and what are they doing?
15 Exactly what I believe the Assistant Treasury of Commerce --
16 I've got it in my notes here, but I -- is that they're
17 creating a paper use society. Exactly what the original
18 document that I was referring to here was warned that you
19 don't want to happen. And they're creating a total monopoly
20 in the process. They're definitely anti trust if anybody would
21 even care to try to question it.

22 When I first wrote to come before you, I thought
23 that there was a purpose and I question now what difference
24 this all makes. If we want to copy books, if the world wants
25 to copy books and music, what are you going to do to stop us?

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1 You're going to sue each one of us individually? Good luck.

2 Right now to even make up what they give away in
3 free goods the record industry at the rate of \$15,000, which
4 is what they appear to be settling, would have to prosecute
5 448 successful cases a day just to break even without
6 incurring any additional court costs or attorneys fees. Not
7 going to happen. You can't stop it.

8 I think it's ridiculous that somebody has to
9 come here and argue why a library should be allowed to have
10 copied of copyrighted materials. It's ludicrous. The fact
11 that he even has to come here and ask.

12 That's all I have to say.

13 MS. PETERS: Thank you, Mr. Ziemann.

14 Mr. Metalitz.

15 MR. METALITZ: Thank you very much.

16 I'm going to talk mostly about the exemption for
17 works protected by malfunctioning, damaged or obsolete access
18 controls which several proponents, it's an existing exemption
19 that they've asked me renewed. I will mention again, as I did
20 in the first session, that of course this has to be done on a
21 de novo basis for the burden of demonstrating the need for
22 this and complying with the statutory criteria is on the
23 proponents. And there's not been very much evidence submitted
24 in this proceeding up until the time of the hearing, so we're
25 kind of playing catchup here.

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1 But this really breaks down into main examples
2 that I'd like to at least briefly discuss. One is the dongle
3 situation which you've had extensive testimony from Mr.
4 Montoro from Spectrum Software and the other is the issue that
5 Mr. Kahle has raised, although he has another formula of a
6 potential exemption, but the issues raised by the Internet
7 Archive.

8 Let me just talk about the dongle situation.
9 Let's stipulate that dongles break sometimes. They don't
10 always work. For only work for finite period of time. Then
11 what? The question is what can the user do then? I mean,
12 there are potentially four situations, I think, and I think
13 the problem that many of our organizations have with the
14 existing exemption that we hope can be rectified if this
15 exemption is recognized again, has to do with confusion among
16 those four situations.

17 In one situation, the vendor or the copyright
18 owner or the dongle manufacturer will replace the dongle for
19 free or at a minimal cost.

20 The second situation, they will replace it but
21 at a substantial cost.

22 The third situation, the vendor or the copyright
23 owners can't be found or is unresponsive to a request.

24 And the fourth situation, the user doesn't
25 bother trying to find the copyright owner or anybody else

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1 responsible, just goes ahead and circumvents or, I suppose,
2 potentially goes to Mr. Montore's company.

3 Now, the problem is that I think as the
4 exemption now reads all of these behaviors are equally
5 sheltered by the exemption. All of them could fall,
6 potentially, within the exemption even though I believe the
7 Librarian only intended that the third situation be covered,
8 the situation in which the vendor can't be found or is
9 unresponsive.

10 In terms of the documentation of which situation
11 is occurring, Mr. Montore submitted an 89 page document that I
12 have taken a brief look at. And what I gathered from those
13 documents is that there are many work arounds that are
14 available in this situation. And some of them are made
15 available by the copyright owner or with the authorization of
16 the copyright owner. And it's not clear to me the extent to
17 which there is a problem here or a substantial adverse impact
18 on the availability of these works for noninfringing uses that
19 isn't resolved by copyright owners themselves or by users
20 seeking assistance that is granted either by the copyright
21 owner or with the approval of the copyright owner. So I think
22 the record is still sparse on that point.

23 Also, I think there's very little in the record
24 about the applicability of this exemption to any works other
25 than computer programs, even though the existing exemption

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1 also covers databases and other literary works. And there's
2 nothing in the record until we get to Mr. Kahle's situation
3 about access control mechanisms other than dongles.

4 I think the bottom line is that without further
5 definition of this exemption, it's hard to see how the record
6 in this proceeding would support a conclusion by the
7 Librarian, at least at this point, that this exemption ought
8 to be recognized for an additional 3 years.

9 I think part of the problem that we see with the
10 existing exemption is a lack of definition. It depends on the
11 three adjectives that are operative here; malfunctioning,
12 damaged or obsolete. The first two are not defined and I think
13 there's a real need to have some type of objective test of
14 when either of those situation applies.

15 Now, obsolete, I'm going to get to that in a
16 little more detail when I talk about Mr. Kahle's submission,
17 but it's defined by reference to or at least there is a
18 reference in the final rule to the definition in Section
19 108(c).

20 I think it is probably more realistic to talk
21 about something that's not supported or an access control
22 technology that's not supported rather than necessarily
23 obsolete. And I think that's the thrust of the 108(c)
24 definition, although that definition has to do with formats
25 and not with access controls.

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1 So if the problem that is demonstrated by the
2 record is the third scenario that I posited, the one where the
3 copyright owner or any other responsible party can't be found
4 or isn't responsive, then it would seem that the exemption
5 should apply only in cases of obsolete, that is to say
6 unsupported access controls. And that that be an additional
7 requirement along with evidence of malfunctioning or damage as
8 measured in some objective fashion.

9 Let me turn now to the Internet Archive
10 submission, which I think raised a number of important
11 questions. Some of these I believe were addressed by the
12 Librarian in the ruling in 2000. That ruling said that the
13 exemption that you recognize for malfunctioning, damaged or
14 obsolete access controls would not cover situations such as
15 those described by certain libraries who expressed the fear
16 that they would be prevented by 1201(a)(1) from reformatting
17 materials that are in obsolete formats. If the materials did
18 not contain access control protections, but were merely in an
19 obsolete format, 1201(a)(1) would not be implicated.

20 As I understand the situation with the Internet
21 Archive, those two sentences describe their situation. The
22 question is are the controls that are preventing the use or
23 the verification of the copies that Internet Archive is able
24 to make, are those copy controls or are those access controls?
25 And I think we raised that question in our submission, and

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1 perhaps we can find out a little bit more about that today.
2 Because ordinarily one would expect that something that
3 produced a copy but which was nonfunctional, would be viewed
4 as a copy control not as an access control.

5 So the first question about the Internet Archive
6 submission is really whether it's within the scope of this
7 proceeding at all.

8 Then there's several different concepts of
9 obsolescence that I found in this submission that I think we
10 have to try to sort out. First, I mean in a sense a lot of
11 the content that is in those packages is obsolete in a certain
12 sense. "The 1996 College Guide" that is referenced in the
13 testimony, I can testify as the parent of a child who was
14 looking for colleges, that information is obsolete,
15 particularly the tuition levels, and no one should rely on it.

16
17 But there may be other types of product that's
18 not obsolete, and there's certainly an important niche market
19 in the entertainment software industry for Legacy games, games
20 that people want to play in the same way that they played them
21 on their Omega and their Commodore 64; they want to play them
22 on newer platforms. So this is not necessarily a category
23 that's without any commercial significance. That's one type
24 of obsolescence.

25 And then there's the question of an obsolete

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1 media or an obsolete format. I think the testimony refers to
2 the necessity to move content from a format before it
3 degrades, such as CD-ROM, and from a medium before it becomes
4 unintelligible and the example of PNG was given. That, I
5 think, is the kind of obsolescence that is frustrating the
6 Internet Archive.

7 And then the third thing that could be obsolete
8 is the access control. But the submission from the Internet
9 Archive said these access controls are not obsolete, nor are
10 they malfunctioning and damaged and that's why they want to
11 have a broader exemption.

12 So we turn to the proposal that they've made for
13 literary works and audiovisual works that are protected by
14 access controls, the original only access controls. And I
15 think there's a lot of questions about whether that proposal
16 can meet the criteria of the statute for a particular class of
17 works. It's an extremely broad proposal. It starts with two
18 entire categories of the categories listed in the Copyright
19 Act, literary works and audiovisual works. It potentially
20 encompasses a very broad range of access controlled
21 technologies. And some of these technologies may well be in
22 use today. The fact that an original only access control, if
23 it is an access control, was used on VisiCalc or on Microsoft
24 Basic and that's frustrating these preservation activities,
25 doesn't mean that an access control also meeting that

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1 description isn't in use today on a lot of much more current
2 products. And I think in many of the submissions you have from
3 the SIAA you have some examples of reasons why copyright
4 owners might use that type of access control today, such as
5 for controlling beta testing and personalized versions of
6 works and for privacy protection.

7 I think the final point I would like to raise
8 about the proposal from Internet Archive is the question of
9 whether access to these materials is available through other
10 means that would not require circumvention of the original
11 only access control if it is deemed to be an access control.

12 We've suggested a couple of these in our reply
13 comments. In some cases the content can be preserved in other
14 forms, in analog forms or through screen shots and other ways.
15 But what really struck me as I looked at the demonstration or
16 the presentation that Mr. Kahle made, was whether access to a
17 lot of these materials can't actually be obtained through
18 agreement with the copyright owner, which of course is another
19 form of noninfringing use. Obviously, this isn't going to
20 apply to everything, but I know the Microsoft Corporation is
21 still in business. I believe IBM is still in business. I think
22 Rick Prellinger, the author of the Ephemeral Film Collection I
23 know is still in business. Apple is still in business.

24 And I wonder to what extent the problems that
25 the Internet Archive is experiencing can be resolved in that

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1 fashion and thereby reduce the necessity for any exemption in
2 order to facilitate access for noninfringing purposes to these
3 materials. So I hope that that is an issue that perhaps we
4 can have some further discussion about.

5 I'll just a word about the security and
6 remediation issues that Ms. Simons raised. Again, this is an
7 issue that was before the Copyright Office and the Librarian
8 in 2000. And I believe the conclusion then was that in this
9 proceeding the Librarian had to move with particular caution
10 when asked to redraw lines that Congress had already drawn to
11 define a permissible exception for purposes such as encryption
12 research and security testing. I think that advice certainly
13 applies as well today.

14 Ms. Simons read into the record again the
15 capsule descriptions that were contained in the ACM's
16 submission in the initial comment round. And, obviously,
17 there's a lot of questions that could be asked about those
18 scenarios. But nearly all of them, it would seem, are
19 addressed either by other existing exceptions to Section
20 1201(a)(1) that already exist in the statute or through other
21 means, such as consent and agreement. So we could go through
22 those, and perhaps there is more information that could be
23 added as to where those scenarios come from and why it's
24 perceived that Section 1201(a)(1) presents a problem in that
25 area.

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1 I can't really comment on the 3 email
2 submissions that she received in the last few days regarding
3 concerns that some researchers have about the impact of
4 Section 1201(a)(1) on their research. Obviously, those
5 concerns are deeply felt. I don't know what the legal basis
6 for those concerns is, but we certainly take a look at those.
7 But I think in the final analysis this is a situation that
8 Congress considered at great length in the process of enacting
9 the DMCA. It drew up a rather detailed exemption or two
10 exemptions for security testing and for encryption research.
11 And if those exemptions are not achieving the purpose for
12 which Congress intended, because Congress clearly intended to
13 encourage the further development of encryption research, then
14 it may be that Congress is the forum in which that line
15 drawing should be revisited and not this proceeding.

16 Thank you.

17 MS. PETERS: Thank you very much. For time's
18 sake, I'll only ask a few questions at this point and give my
19 fellow panelists a chance.

20 Mr. Kahle, I'm trying to understand the scope of
21 the exemption that you're looking for and to identify exactly
22 what the problem is. The difference between the format that
23 may be obsolete and what you referred to as basically
24 embedded, I guess, computer programs that you have to get
25 around in order to actually gain access to it.

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1 All the things that you showed us, and the 16
2 works but only one of them could be used.

3 MR. KAHLE: Right.

4 MS. PETERS: Do those works all basically have
5 some embedded software that makes it so that they're no longer
6 accessible? If not, what's the problem with the 15?

7 MR. KAHLE: The problem for some of these
8 materials, I don't know, take Ephemeral Films, we can make a
9 copy of the bits that reside on this aging media, though
10 there's software embedded with the content that does certain
11 checks to make sure that, for instance, the CD-ROM is in the
12 CD-ROM player. And if you're running this on an emulator, you
13 can fake it out, circumvent particularly code around those
14 issues to sort of make it think that everything is fine. But
15 if you do not do that, it will not play.

16 These softwares are a little bit different. Let
17 me see if I can try to answer that. There's this constant
18 migration --

19 MS. PETERS: I'm trying to get at the access
20 control. Just the access control

21 MR. KAHLE: The access controls are often
22 original only access controls in this era of software where it
23 requires that you have a physical floppy in a floppy drive to
24 be able to run. It's not that the bits are accessible. It's
25 that it does certain checks to make sure that you have the

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1 original in your possession.

2 MS. PETERS: Okay.

3 MR. KAHLE: That's the case of some of --

4 MS. PETERS: Take the 5 1/4 floppy disk.

5 MR. KAHLE: Yes.

6 MS. PETERS: You've got it, but you don't have
7 the equipment to play it? I still don't totally understand
8 what it is in that floppy that makes it nonaccessible.

9 MR. KAHLE: Okay. Sorry.

10 It's not that the floppy may not -- this floppy,
11 if we found an Apple II from that era and we put it in, it
12 could play.

13 MS. PETERS: Okay. Right.

14 MR. KAHLE: And that would be terrific. That
15 would be a huge step forward.

16 What we're trying to do is migrate these
17 materials onto more stable media.

18 MS. PETERS: Right.

19 MR. KAHLE: Currently that's hard drives. If we
20 were to do that, make a replica. We have the original, we
21 want to make a copy that functions the same way as an Apple II
22 running an Apple Writer program, then that whole environment
23 of the emulator of the underlying Apple personal computer as
24 well as the hard drive version of the bits that were on the
25 floppy, all have to act as if were the original.

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1 MS. PETERS: Okay. But I'm still hung up with
2 where the access control is.

3 MR. KAHLE: The access control is when the
4 software on the floppy goes and says is this floppy in the
5 floppy drive.

6 MS. PETERS: So there's a piece of code that
7 says I don't play unless I'm in a floppy player?

8 MR. KAHLE: Often. Often. In a majority of the
9 cases here, that's the case.

10 MS. PETERS: And in the others?

11 MR. KAHLE: There's a dongle that sort of checks
12 to make sure you have that.

13 MS. PETERS: Okay. A dongle.

14 MR. KAHLE: Does it have the CD. There's certain
15 things it checks certain things about the drivers. There's
16 these sort of couplings --

17 MS. PETERS: Okay. Because these are really all
18 before the era when we talked about technological protection
19 measures. So these are things that were done way back when,
20 but just put in -- I don't know. I don't know why they were
21 put in. But they effectively now preclude getting access to
22 them, is that what you're saying?

23 MR. KAHLE: As I understand it, these measures
24 were done by software companies, and I worked for some of
25 them, were done so that people were forbidden to access the

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1 materials on the disk unless, for instance, you had a physical
2 copy or you had the right set of configurations.

3 MS. PETERS: Okay. And the same issue is with
4 regard to -- not to software. We're talking about software
5 mostly. But with regard to games, video games?

6 MR. KAHLE: Games are often also these sort of
7 software/hardware combinations as distinct from, say, audio
8 CDs or DVDs that have data on the disks and the sort of
9 protections and such tend to be build into the players. These
10 things are sort of this mush of content and software that
11 plays through computer programs. I'm sorry, I'll try to be
12 concrete.

13 MS. PETERS: No, that's all right. I still am
14 struggling with what it is we're trying to do. Let me just
15 switch it -- because maybe other people can ask what I'm
16 trying to get at more effectively.

17 Your original category was literary works and
18 audiovisual.

19 MR. KAHLE: Yes.

20 MS. PETERS: And what you talked about, however,
21 was software and like games, which is a much narrower
22 category. Is your focus mostly on software and games or is as
23 broad as --

24 MR. KAHLE: The pieces here are sort of a
25 representation of a class of some of the types of things we're

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1 dealing with. We think of these as audiovisual materials and
2 literature. They just happen to be rendered with computers.
3 You know, this is probably the best example of the sort of
4 literature. It's a --

5 MS. PETERS: It was a book.

6 MR. KAHLE: -- book. It was a book. This is the
7 computer version of it, and here's a sort of screen shot of a
8 sort of dorky, you know, early bad colored graphics that they
9 could view in those days. But they're trying to render a book
10 on a screen. Okay. Maybe not great. But at last seminal in
11 terms of early.

12 And movies, audiovisual works as well as
13 software and games that sort of have all of these components.

14 So if I could figure out some other way, they
15 seemed, at least to a layman, qualify. They're just of the
16 computer generation.

17 MS. PETERS: Okay. I'll still struggle with my
18 question.

19 MR. KAHLE: Sorry.

20 MS. PETERS: Maybe I'll come back.

21 MR. KAHLE: I apologize.

22 MS. PETERS: No. It's my issue that I haven't
23 quite figured out.

24 I'm going to let the rest of the panel ask
25 questions while I try to figure out.

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1 MR. KAHLE: Right.

2 MR. CARSON: Okay. I'm having the same problem
3 the Registrar has on whether or not these original only access
4 controls are truly access controls. But I'm not sure I know
5 how to ask the question any better to get an answer. Maybe
6 it's our problem, not yours in terms of our not quite getting
7 what you're saying. But I'm not entirely sure we're talking
8 about an access control and I'm wondering if you can sort of
9 make the case as to how this qualifies under the statutory
10 definition of a technological measure that controls access to
11 a copyrighted work?

12 MR. KAHLE: It may be that those words mean
13 something different to a lawyer than it does a layman. You
14 know, I've been reading some of this stuff and some of it's
15 pretty -- anyway.

16 MR. CARSON: Whatever you were going, you're
17 absolutely right.

18 MR. KAHLE: But these materials, the design and
19 the implementation of these measures were put in place to keep
20 people from accessing these underlying works if you had a copy
21 of them on another medium.

22 You can copy these things, you just can't access
23 them. You have to blow through the access protections to be
24 able to run them. You might be able to save the bits on the
25 floppy or the CD-ROM exactly as it was. But you can't play

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1 them in a new environment.

2 MS. PETERS: But nobody can see them and nobody
3 can hear them?

4 MR. KAHLE: Right. No researcher can even -- we
5 as librarians can't even find out whether we did our jobs
6 right. And I have a thorn in my side about this because we
7 were trying to in a different circumstance archive websites
8 for the Library of Congress. And we didn't go back and look if
9 we were doing it right. And we blew it. And when I find this
10 out, we do it over and over again. If we don't actually check
11 our work to make sure that the functioning real environment on
12 a migrated version and in versions that don't rely on the
13 physical media or having an Apple II; we need to move this
14 stuff forward and be able to access this stuff and be able to
15 use it and expose it to researchers or I think we'll fail. I
16 actually know we will fail.

17 MS. PETERS: Could I ask, what is it if there's
18 some kind of an exemption --

19 MR. KAHLE: Yes.

20 MS. PETERS: -- what is that you will be able to
21 do that will in fact make it accessible?

22 MR. KAHLE: Okay. Good. What we're looking to
23 do is make a copy of the bits that are stored on these media
24 into a more stable environment, hard drives currently. And
25 then couple with other emulation software that is written

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1 independently or together to try to get that to function and
2 be able to live in the new world kind as if it were the old
3 world.

4 So as if you were sitting in front of an Apple
5 II. We want to have a replica so that we have this in the
6 physical form, we can look at the packaging. Then you can go
7 to a modern computer and go and say what would it have looked
8 like if I had this dongle and had an Atari something or other.

9 MS. PETERS: What does it take in order for you
10 to do that? In other words, you said you replicated it. You
11 got all the bits but now you can't see it and maybe you can't
12 hear it. But how do you -- what do you do to that work? What
13 are you circumventing? What are you getting around?

14 MR. KAHLE: If we are trying to take this floppy
15 from Lotus 123, we believe we know how to actually read the
16 old PC Jr. and make a verbatim sector for sector copy onto a
17 hard drive. Then we need to emulate and have software around
18 that transcription of the floppy to emulate and fake out this
19 software to make it believe that it is still inside an IBM PC
20 Jr.

21 MS. PETERS: So, but what is it circumventing?
22 It sounds like you're adding something that will make it do
23 what it could have done before.

24 MR. KAHLE: We are trying to make it do what it
25 did before by --

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1 MS. PETERS: Are you taking the bits from before
2 and doing something to them?

3 MR. KAHLE: No. We're going to try to run them.
4 And by running them in this fake environment we have to
5 specifically go out after the techniques that the publishers
6 used to try to keep piracy from happening and defeat that. We
7 have to go out and find every piece -- and there are sorts of
8 creative things that they did in this early PC era, most of
9 which are gone now. But of jumping around -- and we have to
10 go and circumvent their intention to keep us from running this
11 off the original work.

12 MS. PETERS: I've got more about what you're
13 doing, but I'm still --

14 MR. KAHLE: I'm sorry. I feel like I'm being --

15 MR. CARSON: The problem is we have lawyers
16 speaking to librarians/technologists. And whether we can ever
17 speak the same language --

18 MR. KAHLE: I've had that problem.

19 MR. CARSON: This meeting is doomed to failure.

20 MS. PETERS: He's giving him the law.

21 MR. CARSON: The law. I'm giving the
22 definition. Hold on there for a second.

23 Okay. So we have the definition here. Section
24 1201(a).

25 DR. SIMONS: Can I make a comment while he's

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1 reading.

2 MR. CARSON: Go ahead.

3 DR. SIMONS: Because it was just suggested to me
4 that perhaps what Brewster is trying to do, and Brewster
5 should correct me if this wrong, is somewhat similar to trying
6 to read what's on a DVD by bypassing the CSS encoding.

7 MR. CARSON: Well, that was occurring to me.
8 Yes.

9 MS. PETERS: Right. Okay.

10 DR. SIMONS: So that was not my original idea.
11 It came from behind me.

12 MR. CARSON: Just walk me through. We've got a
13 definition in the statute of when a technological measure
14 effectively controls access to a work. It says: "A
15 technological measure effectively controls to a work if the
16 measure in the ordinary course of its operation requires the
17 application of information or a process or a treatment with
18 the authority of the copyright owner to gain access to the
19 work."

20 So I gather the key question here may be does
21 this original only access control you're talking about, is
22 this something that is requiring the application of
23 information or a process or a treatment to gain access to the
24 work? And if it is, try to explain to us how that's happening.

25 MS. SELVAGGIO: Can I -- can I --

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1 MR. KAHLE: Try to be my interpreter.

2 MR. CARSON: Identify yourself for the record.

3 MS. SELVAGGIO: Yes. Marian Selvaggio. I'm with

4 Wilson --

5 MR. CARSON: Oh, we have a lawyer. Okay.

6 MS. SELVAGGIO: You have a lawyer.

7 MR. KAHLE: Help me.

8 MS. SELVAGGIO: These programs were written so
9 that you could only play them in a particular place.

10 MS. PETERS: In a player. Okay.

11 MS. SELVAGGIO: What Brewster and the Internet
12 Archive are doing is writing code that circumvents that access
13 control so that you can now get to it without having a player
14 you need. That's the circumvention that they're doing.

15 MR. CARSON: Okay.

16 MS. PETERS: Okay.

17 MR. CARSON: I think I get the circumvention. I
18 just want to make sure I understand the technological measure
19 that effectively controls access to the work is.

20 MS. SELVAGGIO: You can't play these, you can't
21 use them in the ordinary course of business without the proper
22 hardware or the proper exchange of information.

23 MR. CARSON: Okay.

24 MS. SELVAGGIO: Because of these access controls
25 you cannot run these as they were meant to operate unless you

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1 have the exact code or the exact hardware that they're
2 requesting. So what Brewster is doing is circumventing that
3 access control and emulating it so that it thinks it has the
4 proper hardware or the proper software and then you can run it
5 as it was meant to be run in the ordinary course.

6 MR. CARSON: All right. Now you talked about an
7 exchange of information, and certainly when you look in the
8 statutory language we're talking about, among other things,
9 the application of information to gain access. So just
10 elaborate a little bit more what's kind of information are we
11 typically talking about that needs to be exchanged or applied
12 in order to get access to the work?

13 MR. KAHLE: As I understand it, these go in pro
14 particular memory locations to find out are they -- they try
15 running the actual disk. If you had a copy, you would go and
16 run the actual disk and try to do transactions with the
17 original CD or floppy that would be in the hard drive or go
18 and try to communicate with the dongle to go and get
19 particular information from the dongle, information that's
20 key, and does it act correctly.

21 The process, does it spin a hard drive. And if
22 you didn't have -- excuse me. If you had a floppy drive or if
23 you didn't have a floppy drive or a CD drive on these
24 computers, then the communication from the program that's
25 written on the floppy would fail.

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1 So there's the information on the floppy. You
2 copy it to a hard drive. It tries to communicate back with the
3 floppy drive or the CD drive, is it there? Hello. If it
4 comes back with no or errors, then it shuts down and you're
5 out of luck.

6 MS. PETERS: Okay.

7 MR. CARSON: Okay.

8 MR. ZIEMANN: May I interject to this. I'm also
9 a computer programmer. And these things are written to prevent
10 a copy from working.

11 MR. KAHLE: Yes.

12 MR. CARSON: Okay.

13 MR. ZIEMANN: Specifically so that you must have
14 the original in the original machine. If you make a copy of
15 it, it's going to say no, sorry. It's a copy and it's not
16 going to work.

17 MR. KAHLE: And interestingly, just -- it
18 shouldn't be interesting.

19 MR. CARSON: Right.

20 MR. KAHLE: Interestingly, a lot of these
21 protections are kind of from the era of the '80s and '90s. A
22 lot of the types of protections that people are doing now
23 aren't these anymore.

24 MS. PETERS: Right.

25 MR. KAHLE: Things are changing. They're doing

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1 these license key exchanges. We're going to have issues with
2 all of that as well. But we're sort of sitting around with a
3 bunch of this stuff and we're starting to find that these are
4 enough of issues, that we have to start working on things from
5 day one. Waiting for them to be obsolete or malfunction,
6 actually, is very scary to us.

7 I'm not sure how we're going to do on this task.
8 Stanford has 19,000 titles of this stuff and they haven't
9 started moving forward with it. But starting to be more
10 proactive, working with the manufacturers, building those
11 relationships but not -- we find when we've tried to write and
12 request information and approval from copyright holders, most
13 of them can't be found even within a year or two of these
14 things being made available. It's just practically impossible.

15 And we have studies of this, of even things from
16 the 1990s, '95, '96, '97 some from Macromedia CD-ROM
17 collection. We wrote to a bunch of the contact information and
18 we tried to find them. And we have very few responses. And we
19 also got a lot of responses from people saying "I'm not sure I
20 can give you that permission," which is sort of an interesting
21 one as well.

22 So unless we have sort of some library of 108
23 style ability to maneuver, I think we will lose a large
24 percentage if not a majority of all of these works.

25 MR. CARSON: Thank you. You just answered my

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1 next question. So I got two for the price of one.

2 Mr. Metalitz, one of the things you said at page
3 18 of your reply comments, and this is with respect to the
4 proposed exemption, actually the current exemption for
5 technological measures that are failing because of damage or
6 obsolescence or malfunction. One of your criticisms is that
7 that current exemption is not confined only to those instances
8 in which the provider has demonstratively refused or failed to
9 provide timely relief in the form of assistance to access the
10 work.

11 Now, I'm trying to remember where you were 3
12 years ago when you were arguing with us about what a class of
13 works was. And I think I remember where we were 3 years ago,
14 and we decided what a class of works was. And I don't recall,
15 certainly an element of what we decided, or an element of what
16 you were arguing ought to be part of the definition of a class
17 of works being referenced to what the copyright owner may or
18 may not be willing to do for you. This sounds like it's
19 getting pretty close to an exemption that looks more upon use
20 and conduct as opposed to a class of works. Am I correct in
21 that? And if so, how do you reconcile that with what I think
22 you were telling us 3 years ago and what we certainly were
23 saying 3 years ago?

24 MR. METALITZ: Well, I think you essentially in
25 our view you essentially got it right 3 years ago in terms of

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1 the definition of particular class of works. And I would agree
2 with you that it should not be defined in terms of what the
3 user and the copyright owner have done. But these exemptions
4 have to be defined in some fashion.

5 In 2000 you said well malfunctioning and
6 damaged, everybody knows what that means so we're not going to
7 define it. And obsolete you referred to Section 108(c). And
8 Section 108(c) says that a format shall be considered obsolete
9 -- now this is, you know, maybe responsive to Mr. Kahle's
10 issue -- a format shall be considered obsolete if the machine
11 or device necessary to render perceptible or work stored in
12 that format is longer manufactured or is no longer reasonably
13 available in the commercial marketplace.

14 That describes a situation in which -- I mean, I
15 don't know how you would know that unless someone asked. I
16 don't know how you would know that it's no longer available in
17 the marketplace or can't be found unless someone went to look
18 for it and wasn't able to find it.

19 What I think was behind the exemption that was
20 recognized, was not so much necessarily a concept of being
21 obsolete, but a concept of being not supported. And that
22 inevitably gets back to the question of whether there's been
23 any effort or any attempt to try to get the copyright owner to
24 support the access control.

25 So I think the solution to this problem,

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1 perhaps, is in a clear or more definite or more specific
2 definition of the adjectives that describe the access control
3 that under an exemption would be allowed to be circumvented.
4 And to some extent those definitions may require an evaluation
5 of criteria that have to do with what the copyright owner has
6 done and what the user has done. I don't think that that
7 transgresses the principles that the Librarian laid down in
8 2000. I think it's a clearer definition of what is the type
9 of access control that can be circumvented.

10 MR. CARSON: So if, for example, and this is a
11 very rough draft of what you maneuver see, but if for example
12 this time around we were satisfied that in all other respects
13 the case had been made and we were going to propose an
14 exemption to the Librarian and we came up with an exemption
15 along the lines of what we did last time, but we said among
16 the conditions it would be that the access control measure is
17 no longer supported by its maker -- very rough draft, as I
18 said.

19 MR. METALITZ: Yes.

20 MR. CARSON: That would satisfy the concerns you
21 were talking about, although in your comment you were talking
22 about it in terms of whether the provider has refused or
23 failed to provide timely release. The unsupported sort of
24 adjective would be sufficient to deal with that phenomenon, I
25 gather, from your point of view?

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1 MR. METALITZ: Yes. I could give a rough answer
2 to your rough question. And that is I think it's a problem of
3 defining what those terms mean.

4 MR. CARSON: Yes.

5 MR. METALITZ: And that definition can include
6 something about whether it's still supported.

7 MR. CARSON: Yes. I get it.

8 MS. PETERS: If you go that way, would that
9 answer Mr. Kahle's problem.

10 MR. METALITZ: Ask him.

11 MS. PETERS: No, but that's the question.

12 MR. KAHLE: No.

13 MS. PETERS: No? If in fact this is not
14 supported by the original manufacturer so therefore there's an
15 exemption, what more do you need?

16 MS. SELVAGGIO: Well, it depends on what you
17 mean by not supported. If he has the right floppy disk to run
18 this, would that be considered still be supported? You're not
19 migrating the media, you're not moving the data. It's still
20 supported because you can still put it in and run it.

21 MR. KAHLE: Let me take also a different crack
22 at it.

23 Trying to do this work is actually kind of
24 tough. I mean, trying to get this stuff to work even the first
25 time is hard. Kind of having your computer and all,

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1 everything sort of set up. I mean, we had it this morning.
2 It's not like putting a DVD in a DVD player. All right. A
3 lot of this stuff seems to be sort of pirated around that sort
4 of world view. That's not what we're dealing with.

5 We're dealing with a lot of different working
6 pieces that we have to get all emulated to work right again.
7 It's extremely helpful if we have as much time as we can and
8 the programmers are sort of part of the program. If they're
9 available, how do we go and emulate your new Atari, whatever
10 it is, your game console with the right sets of pieces?

11 If we have to wait for all of the pieces to be
12 not supported, does that mean that it's already too late?

13 There's another characteristic as I understand
14 it in this exemption that causes problems. It's when the
15 access controls start to become obsolete but the underlying --
16 the access controls might be perfectly operating fine. But
17 we've lost the rest of the media or we've lost abilities to
18 read certain sectors of the drives -- of the media. And the
19 whole thing starts to fade.

20 So the idea of putting a time thing, sort of
21 push it off into the future and wait until it's obsolete and
22 then whose going to care quite so much; in this digital realm
23 especially in things that involve the interactions of lots of
24 different computing components, I fear we will just lose a lot
25 more. And when we start to deal with Internet style software,

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1 and we've got to start on it immediately because it's got
2 client server pieces -- but that's not the subject today.
3 Three years from now we'll come back and we'll have a lot more
4 to say about supporting those materials. These are where we
5 have concrete examples and we would like to start to emulate
6 and deal with Windows 98 software, Windows 2000 software,
7 McIntosh software of different forms, even those are still
8 currently being sold by the manufacturer.

9 MS. PETERS: Mr. Kasunic?

10 MR. KASUNIC: Mr. Metalitz, on page 41 of your
11 reply comment, and this goes to the question of what kind of
12 control are we talking about here, you said that it was less
13 than clear whether this is was an access or a copy control and
14 said that: "A technology which allows copying but which
15 renders the resulting copies less than fully functional should
16 be classified in DMCA terms as a copy control subject to
17 1201(b) not an access control."

18 So after listening to the description that we
19 heard here, can you make our lives a lot easier and tell us
20 that that's not within the scope of Section 1201 and that he's
21 free to circumvent without an exemption?

22 MR. METALITZ: Well, I'm not sure I could make
23 life easier, but I am struck by what my colleague here said
24 that the real purpose of these was to prevent someone from
25 making -- at the time, was to prevent someone from making a

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1 copy --

2 MR. ZIEMANN: That would work.

3 MR. METALITZ: -- and presumably that would
4 work. And presumably that would -- I may be wrong about this,
5 maybe Mr. Kahle can set me set. Presumably that would mean
6 even a copy that would work in that a original floppy drive.
7 So it isn't a question of emulating the hardware. It's a
8 question of the copy not being functional.

9 In other words, if back in 1985 I had made a
10 copy of that 5 1/4 inch floppy disk and put it into the same
11 machine that I was trying to run the original on, would it
12 work or would it not work? If it would not work, it seems as
13 though it's a copy control.

14 MR. ZIEMANN: On the McIntosh software the first
15 thing that was there was something that you needed an extra
16 piece of software to access and it was called the bozo flag.
17 And if you checked the box and somebody copied it, it just
18 didn't work.

19 MR. METALITZ: Even in the same machine then?

20 MR. ZIEMANN: Even in the same machine.

21 MR. KAHLE: Well, than the -- well, even, there
22 might be copy protections, but that's as I understand it not
23 the subject. Actually it's the access protections that we're
24 having troubles with.

25 We can copy of lot of these materials. It's the

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1 access protection. So whether we're allowed or not allowed to
2 do the copy protections, if we blow the access protections as
3 I understand, bad things happen. And I'm not exactly sure,
4 George, how to answer your question of who they happen from,
5 but these guys say don't do it. So we need to blow the access
6 protections. We have to circumvent the access protections to
7 be able to do our job.

8 Yes, there may be copy protections that we have
9 to deal with as well, but as I understand it, that as not as
10 much of an issue that we have to deal with.

11 MR. KASUNIC: Well, even if this was initially
12 intended to be a copy control, once you've reproduced that and
13 in terms of getting access to that reproduction, wouldn't
14 1201(a)(1) apply then? Of you could not get access to that
15 reproduction of the work, would there be a Section 1201(a)(1)
16 issue?

17 MR. METALITZ: Well, don't just take my word for
18 this. His would -- what the Copyright Office said 3 years
19 ago.

20 MR. ZIEMANN: What do they know?

21 MR. METALITZ: To the extent that technological
22 protections prevented the library from converting the format,
23 those protections would seem to be copy controls, the act of
24 circumvention of which is not prohibited by Section 1201.

25 Now, I think in the questioning that Mr. Carson

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1 had of Mr. Kahle, I think I can see -- I understand better now
2 how this can also potentially be described as an access
3 control by looking at that definition of access control
4 mechanism. My concern would go toward how bounded this
5 description is of an original -- well, it's called an original
6 only control which, again, to me sounds like what the court
7 said it was in 1988, a copy control. But leaving that phrase
8 aside, I guess I wonder what is the difference between this
9 type of access control that requires checking to see that it's
10 running in the right machine and a lot of access controls that
11 are used today, some of the other techniques that Mr. Kahle
12 talked about, that are used to make sure that the program is
13 being run, perhaps, in the machine to which it was dedicated
14 at the time of registration or to a machine within a certain
15 network. So, for example, it's accessible by anyone using a
16 computer within a particular university network but not by
17 somebody else outside the university system.

18 A lot of techniques are being used now to make
19 sure that you can't have access to a particular work unless
20 it's done in a machine that has certain characteristics. And
21 part of what I was hearing in the description of the controls
22 here also fit that criteria. So I guess I am somewhat
23 uncomfortable with describing this as an access control until
24 I had a better understanding of how this can be distinguished,
25 this 1980s and early '90s technology, can be distinguished

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1 from what is being used today in an access control
2 environment.

3 MR. KASUNIC: Well then isn't it reasonable to
4 understand the Internet Archive's concern since there is --
5 it's very unclear whether this might be or might not be an
6 access control, then their concern is legitimate in a need for
7 an exemption if we can't -- if the potential for violation for
8 doing what they're doing is there?

9 MR. METALITZ: Well, I'm not saying that their
10 concern is legitimate. I do think there's an argument to be
11 made that much of what is impeding their activities is a copy
12 control and not an access control. But maybe I don't
13 understand enough about how this technology works to come to
14 any definitive conclusion on it.

15 It also leaves open the question of to what
16 extent -- I mean, I hear what Mr. Kahle said that in many
17 cases these copyright owners can't be found. But on the other
18 hand, when he shows us the 16 greatest hits and most of them
19 are from companies that are, you know, still actively being
20 traded on Nasdaq and presumably are accessible, to request --
21 well, I don't whether he's got responses from them or not.
22 But to see the many -- there seems to be many other ways to
23 ensure the availability of these materials for noninfringing
24 uses. And again, I'm assuming that his uses are noninfringing
25 under 108 that don't require circumvention of an access

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1 control in a way that also could effect both, as he indicated,
2 products that are still currently in the market and
3 techniques, access control techniques that are being used for
4 many different purposes.

5 MR. KASUNIC: Mr. Kahle, do you have a response
6 to that in terms of whether it is easy to get permission or
7 are there other ways of accomplishing your ends?

8 MR. KAHLE: We have found anecdotal that even if
9 these companies exist, that they may not have the original
10 source code versions that don't have the access controls as
11 part of them such a way that they would be able to donate them
12 to a library. That often -- if you go and show this to Lotus,
13 they go, "Wow. Cool. Great. We'd love -- can we have one
14 back for our library." Because back in that day of -- this is
15 1982, we were in different building. They don't have this
16 stuff. The publishers aren't librarians. They're out to make a
17 buck. And they're required to, based on how corporate law
18 works. So even if they're around, it's often extremely
19 difficult.

20 There's anecdotal. The requests that we have
21 sent out, and this is a study, show that very few, even the
22 emails on these -- or the physical addresses working. So
23 maybe they've moved. But it starts to become fairly difficult.

24 So I think even if we were -- we were just
25 looking for permission, much less help from these guys on

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1 being able to do these things.

2 I think the publishers will do publishing
3 activities, the libraries should do library activities. And
4 protection 108 helps us stay out of their way commercially.

5 MR. KASUNIC: I just have one other question,
6 and it's changing gears a bit, in terms of the statutory
7 exemptions in line with research and encryption for security
8 research. And also the privacy exemption.

9 And, Mr. Metalitz, you've made the statement
10 about proceeding that we did also make, and I've asked a
11 recommendation about proceeding cautiously where there is
12 congressional exemptions. But it seems, and correct me if I'm
13 wrong, Professor Simons, but this adequately -- or do these
14 congressional exemptions adequately fit computer software?
15 For instance, in the subsection, I guess it's (g) dealing with
16 security -- or (j), excuse me, dealing with security testing
17 does not specifically mention computer programs. And so we'll
18 leave that term completely out of that subsection. And there
19 also seem to be some potential holes, anyway, in terms of
20 privacy research. For instance, one thing that's come up in
21 our comments is spyware, trying to get privacy information
22 that in subsection (i) there is the requirement that there be
23 conspicuous notice on the spyware before you can circumvent to
24 see what it's doing. Are these statutory exemptions too
25 narrow for the present circumstances?

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1 DR. SIMONS: Thank you for asking me that
2 question.

3 It's our view that essentially all of the
4 statutory exemptions that would apply to computer scientists
5 are too narrow. If you look at the security exemption J, it
6 says with the authorization of the owner or operator of such a
7 computer. So that's -- so you first need the authorization in
8 order to do the security research to begin with.

9 So if you happen to be using a program where you
10 -- I mean, if you think about the impact on just computer
11 security in general, I think it's really quite serious. I
12 personally find it somewhat ironic that at a time when we are
13 so concerned about security in general in this country that we
14 have legislation that is hampering security R&D, not only to
15 do the investigation to see how secure software might be, but
16 also to disseminate information when you find vulnerabilities.

17 One of the people I quoted referred to the fact
18 that when this research isn't done, that the pirates will
19 prevail.

20 I understand that piracy, a term I don't
21 particularly like, but infringing behavior is of concern to
22 owners of intellectual property. But there are many other
23 issues that we need to be worried about. In particular, we
24 need to worry about the security of the information
25 infrastructure. And to the extent that it's insecure, which it

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1 is seriously insecure, and to the extent that we are hampered
2 from investigating some of these insecurities and from
3 revealing them, not only does it make this country -- I mean,
4 it makes this country more insecure and it also ironically has
5 a negative impact on the very people who pushed for this
6 legislation to begin with because then they will find
7 themselves using protection mechanisms that they may not even
8 know are insecure because nobody can tell them. But the bad
9 guys will know, right? Some of these things are really
10 extremely fragile.

11 So another way of looking at some of these
12 exemptions because they are so weak, what this bill basically
13 does is it protects weak forms of protection. And it just
14 seems to me that that's not in anybody's interest.

15 I don't know if I answered all your questions.
16 As far as the privacy goes, of course again if there is
17 spyware or some other invasive type of software, sometimes you
18 can't know it's there without looking. And if you're not
19 allowed to look, then you can't find out.

20 MR. KASUNIC: Mr. Metalitz, do you have any --

21 MR. METALITZ: Well, I think in general the
22 issues that you raise about the scope of the existing
23 statutory exemptions are issues that are best addressed to
24 Congress that wrote these exemptions and, obviously, has the
25 authority to change them and in light of changing

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1 circumstances.

2 The job of this proceeding is somewhat
3 different. And I think the need to demonstrate the reduced
4 availability -- or the adverse impact on the availability of
5 materials for noninfringing uses is the touchstone of this
6 proceeding which may not be the same thing.

7 On 1201(i), I'm not sure that I understood the
8 question that you were raising, but it does -- it actually
9 rather closely tracks the spyware concern that at least one of
10 the submitters in the initial round raised. It basically deals
11 with the undisclosed surreptitious collection of identifiable
12 information. And it allows you to circumvent an access
13 control that does that under those circumstances.

14 DR. SIMONS: But how do you know if it does it
15 without circumventing it?

16 MR. METALITZ: How do you know if it does it?

17 DR. SIMONS: How do you know that it does this
18 without circumventing it?

19 MR. METALITZ: Well, you have to have some way,
20 some evidence or some reason to believe that personal
21 identifiable information is being collected.

22 DR. SIMONS: Right. But suppose you're wrong?

23 MR. METALITZ: It doesn't necessarily mean you
24 have to circumvent in order to find that out.

25 MR. KASUNIC: But if you're wrong, you're in

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1 violation, right?

2 DR. SIMONS: Right.

3 MR. METALITZ: In other words, if you think it
4 does collect personal identifiable information and it turns
5 out that it doesn't collect personally identifiable
6 information is your act of circumvention a violation? The act
7 of circumvention is really dedicated to identifying and
8 disabling the capability. So you're saying if the capability
9 doesn't exist, does that not come within the category of
10 identifying it because it's a *nil situ* and you haven't
11 identified it? I don't know the answer to that question.

12 MS. PETERS: Charlotte?

13 MS. DOUGLASS: Yes. For Mr. Kahle. It seems
14 tome that there's a little bit of a disconnect between your
15 objectives, which is to protect things for a 100,000 years and
16 this proceeding which is just for 3 years, maybe recurring,
17 but this proceeding. Because it just seems like you are
18 interested in maybe protecting things that may break down,
19 protecting things that essentially are in need of archiving.
20 I'm going a long way around. But I'm having a difficult time
21 also seeing that this is really access protection.

22 What do you want from the Copyright Office? I
23 mean would you be happy if we said this is a copy control and
24 go home? I mean, it's just not clear that it's access
25 control.

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1 MR. KAHLE: I'm sorry. Gosh, that's tragic.

2 You know, I say people. Okay.

3 Let me try to answer your preamble before--

4 MS. DOUGLASS: Okay.

5 MR. KAHLE: So why are we so concerned with the
6 next 3 years when we've got sort of a longer term time frame
7 that we're really trying to deal with? The urgency comes, and
8 this stuff's rotting now. If we don't do our preservation
9 now, we don't get another chance. And I fear that, you know,
10 this stuff's already gone. So, the urgency here for us in the
11 preservation is we've got to act now and please don't put it
12 off another 3 years. Because these floppies are now 20 years
13 old. And they're starting to go. And anecdotal it takes 6
14 floppies to find out that doesn't have a read error. This
15 comes out of the gaming community. So anecdotal I think so
16 that's the urgency.

17 MS. DOUGLASS: Okay.

18 MR. KAHLE: Does that help?

19 MS. DOUGLASS: Yes, it does. I was looking at
20 first effect.

21 MR. KAHLE: Okay. Then real issue that a copy
22 control or access control, what do I want from the Copyright
23 Office? If you think like librarians are conservative folks,
24 and we are, go and ask some of the lawyers that advise us and
25 these guys, especially when the lawyers are working

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1 universities, they go and see endowment. Endowment and they
2 divide endowment by \$10,000 each potential infringement,
3 right. And the answer is often no.

4 We need things to be fairly straightforward for
5 us to be able to do our jobs. And if there's murkiness, we're
6 not a risk taking group. But we're a little desperate at the
7 moment because we're seeing the stuff evaporate. But as a
8 group, Stanford -- you know -- so. That's the -- what do I
9 want from the Copyright Office?

10 I was told by our lawyers, these high priced
11 folks that are --

12 MS. SELVAGGIO: This was pro bono.

13 MR. KAHLE: Yes. Another way of looking at it,
14 say thank you. Is tens of thousands of dollars has been put
15 forward by a number of organizations, including these guys,
16 to be able to get here. I don't know how long we can sustain
17 this. I'm not sure how long the premier law firm in Silicon
18 Valley is going to do this stuff pro bono for a library.

19 So we have to try to lighten things up a little
20 bit in terms of how hard this stuff is to do.

21 But what do we want? I'm told that even if you
22 guys don't say "Hey, that's copy protection, you're just fine.
23 Go nuts, go through it." That if the first time that we think
24 we're blowing an access protection, and these things are
25 designed to stop access, we're liable. And no matter what you

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1 say. I mean, it might help us. You know, Judge, here we have
2 -- Charlotte going and say, hey, we're kosher. But that means
3 we'll have to find that out in a court of law. And just the
4 threat of litigation on this stuff is chilling. We just end
5 up with people spending a lot of time with lawyers. So what
6 I'd really like it to make it clear cut. And we're attempting
7 with this verbiage to be actually fairly narrow. I realize
8 that's a fighting term that you sort of hit the ping back and
9 say, "Oh it's broad, it's narrow." The idea is to try to make
10 it so it doesn't cover DVDs and CDs and things. It's the kind
11 of stuff that's got software all wrapped into it. And it's
12 something that's kind of a nice aspect of this, is it's so
13 hard to do the job that we're setting out to do, that it's not
14 like any script kitty is going to go off and blow access
15 protections and post stuff because of this DMCA exemption.

16 This is going to be adopted by institutions that
17 can employ the programmers. Because we can't distribute, as I
18 understand, the things that we discover on how to circumvent
19 access protections. We have to employ these people within our
20 own organization and we have to then do it on our own
21 materials for in-house use of these materials because of
22 Section 108, because we can't without agreement, have things
23 available. And that's a bunch of "ifs." And I think that that
24 brings it down to be, hopefully, narrow enough that you can
25 grant us if it's got a software access control that we're

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1 allowed to circumvent that.

2 MS. DOUGLASS: Okay. Thank you.

3 I'm sorry.

4 MR. KAHLE: That's what we want.

5 MS. DOUGLASS: Okay.

6 MR. KAHLE: Just to do our job.

7 MS. DOUGLASS: I have to make a little bit

8 clearer, however --

9 MS. PETERS: Thank you.

10 MS. DOUGLASS: Oh, I'm sorry.

11 MR. ZIEMANN: There's something you may not

12 realize that takes this to the next step is that in the

13 interest of digital rights management, many of the software

14 companies are intentionally attempting to make some things be

15 obsolete. And an example that I have right here is McIntosh

16 tech manual that my wife, who is a teacher, bought for the

17 purpose of keeping the computers at the school running. But if

18 you put this in a McIntosh, even though it is McIntosh tech

19 manuals that has OS/X in it, it will not recognize that it

20 even exists. But if you go backwards to one previous

21 operating system, it works fine.

22 And so Apple has on its own for some reason

23 decided it doesn't want this particular CD to play.

24 MS. DOUGLASS: On the new generation?

25 MR. ZIEMANN: Yes. OS/X. If I give this to him

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1 and he puts it in his machine, it will not see it. And I can
2 say that without ever having touched his machine.

3 MS. DOUGLASS: Well, there's an area of 108--

4 MR. ZIEMANN: But is that copy protection or is
5 -- have they made new software that prevents the access?

6 MS. DOUGLASS: Well, if it prevents access the
7 way it says access protection is defined in 1201, then we'd
8 have to say it's access protection. But I don't think we've
9 gotten to that point yet.

10 But if I can go back just a little bit to--

11 MR. ZIEMANN: I just needed to make that point.

12 MS. DOUGLASS: -- Mr. Kahle. You said
13 broad/narrow, broad/narrow, you know, potato/potato. But it
14 really does seem like we have a broad category, I hate to say,
15 if we're talking about all literary works and all audiovisual
16 works unless it's paired down somewhat.

17 MR. KAHLE: That has software -- better than
18 software. There's a lot of materials that have separate data
19 from the software. CDs, DVDs, VCR tapes. Those are not what
20 we're talking about. We're talking about this sort of -- it's
21 the CD-ROM generation, which I'm tragic report a major
22 manufacturer decided because of the copyright vagaries, they
23 decided to destroy their collection of 10,000 CD-ROMs rather
24 than donate it to the library.

25 The stuff because it's not clear enough, that's

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1 not 1201 issue, as I understand it. It is -- we've got to
2 make it easier. And you can help greatly, but it's just for
3 this complicated multi piece computer dongles, game players,
4 joy stick, running over the Internet; all these sorts of odd
5 ball now becoming fairly massive cultural items, those aspects
6 of our cultural heritage are in danger. And if there's
7 someway of restricting it -- that's what we're trying to do.

8 MS. DOUGLASS: I understand.

9 I think I have a question of Mr. -- well, Ms.
10 Simons. With 2 Ms?

11 DR. SIMONS: One.

12 MS. DOUGLASS: Oh, okay. I'm sorry. Okay. You
13 note substantial negative impacts on basic research, and you
14 give a number of examples. Are those actual examples or are
15 they hypothetical examples? And if they're hypothetical, do
16 you have any information about the likelihood of those
17 actually occurring?

18 DR. SIMONS: Well, the three quotes I read to
19 you were actual.

20 MS. DOUGLASS: The last -- the ones that you
21 read to us today?

22 DR. SIMONS: Yes.

23 MS. DOUGLASS: Okay. I was thinking of the ones
24 in your statement.

25 DR. SIMONS: Those are hypothetical. But they

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1 were mainly to illustrate the kinds of -- the kinds of
2 scenarios where you would like for people to be able to do
3 something which they are prohibited from doing under the DMCA.

4 MS. DOUGLASS: I see. Thank you.

5 And I think I have one question for your, Mr.
6 Metalitz. Actually, this question might have been answered,
7 but you can just say asked and answered.

8 You say that this exemption if it was proved
9 that -- I'm now talking about malfunctioning and dongles.
10 Should be conditioned on meeting objective verifiable
11 criteria. How can we do this? This is what Congress had in
12 mind when it specified a class of works? In other words, how
13 can we write all that in and we're really needing to talk
14 about Congress says give us a class of works.

15 MR. METALITZ: I think you can do it consistent
16 with the guidelines that you laid out in 2000, which dealt
17 with a class of works but also made an effort to describe a
18 certain type of access control that was being circumvented.
19 My concern is that that description is too open ended. That,
20 for example, it doesn't address the question of who determines
21 whether is -- or by what criteria one determines that
22 something is malfunctioning or damaged. And then on the
23 obsolete question, which may perhaps be more accurately
24 unsupported, that also -- you had a cross reference in there
25 to Section 108, but to me that indicates that you felt it was

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1 acceptable to limit the types of access controls that could be
2 circumvented by reference to whether they were available in
3 the marketplace.

4 So, I guess my suggestion here I think is
5 compatible with what you decided in 2000 and would simply
6 provide greater clarity, greater definition if you determined
7 that based on the evidence in this proceeding --

8 MS. DOUGLASS: Right.

9 MR. METALITZ: -- that an exemption is
10 necessary.

11 MS. DOUGLASS: Thank you, Mr. Metalitz.

12 MS. PETERS: Steve?

13 MR. TEPP: Thank you.

14 Dr. Simons, you had mentioned earlier your
15 assertion or your belief that none of the exemptions to
16 Section 1201 are sufficient to do what you and others in your
17 organization want to do. I want to focus specifically on
18 encryption research, and that 1201(g). And ask you if you can
19 give us some specifics about what it is you want to do that
20 you can't do under 1201(g)?

21 DR. SIMONS: All right. Well, just as a general
22 philosophical comment, we were -- we got involved with the
23 DMCA was being debated in Congress, but later in the show. By
24 the time we found out about it, we were told that it was
25 basically written in stone. Found out about it and got upset

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1 about the fact that there were no encryption research at all,
2 and started -- and that's how we found out and started pushing
3 for that. And we also talked about security, and I think we
4 may have had something to do with the fact that there's a
5 security exemption in there.

6 I should add that we don't lobby. We were
7 raising the technical issues. We weren't saying how people
8 should vote on the legislation.

9 But as a philosophical view of this as a
10 computer scientist, I was watching this whole process as
11 various carve outs were being discussed by Congress. And it
12 made me quite uncomfortable because -- I mean, I started
13 taking computer science in 1970. Things have changed a lot
14 since my first programming course. And to try to make -- to
15 try to say -- everything is illegal except for this and this
16 and this means that there is probably going to be other things
17 that come along which you weren't thinking about when you said
18 except for this, except for this. And that's, in fact, what
19 has happened.

20 I truly believe that Congress did not intend to
21 pass a law which would jeopardize computer security R&D in
22 this country, but that's in fact what they have done.

23 Now, getting back to the encryption area. One
24 of the problems here -- well, backtracking a little bit before
25 I answer your question directly. Computer science and

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1 computing is still a new field. And there are a lot of people
2 who are working in it in various levels. Some of them don't
3 have credentials. Some of them are young kids who don't have
4 credentials. Some of them who have barely graduated from high
5 school, let alone -- so they have no credentials. But some of
6 these kids are really sharp and they really understand these
7 things. And you can imagine that in some cases they might
8 break some sort of encryption scheme.

9 Now, someone that doesn't even have a college
10 degree certainly doesn't qualify under these definitions.
11 Because, as I understand it -- let's see, where is it? They
12 talk about the person who does this and my understanding is
13 that in general it's supposed to someone who is an encryption
14 person doing encryption research. I'm looking, trying to see
15 if I can find this in real time.

16 So when Ed Felton, for example, was threatened
17 under the DMCA, I mean he's pretty close -- I mean, he's
18 actually not an encryption researcher, he's a security guy.
19 But you could say stuff -- but he knows some encryption stuff.
20 I mean, the very fact that somebody whose a Princeton
21 professor was threatened has an incredibly chilling impact.
22 And so then you go on down the line to this kid somewhere who
23 maybe broke some weak encryption scheme and is he or she going
24 to be considered an encryption researcher? I don't think so.

25 I mean, that's one of the concerns is that by

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1 saying what's -- by saying everything is disallowed except for
2 such and such, and such you leave out a lot. And when you're
3 talking about technology, in particular, you leave out a lot.
4 And in fact, even when you're trying to define the technology
5 I think you get into trouble.

6 Just going back to the beginning where -- to
7 1201 where you they talk about effectively circumventing, what
8 does "effective" mean? I had a lot of trouble with that phrase
9 "effectively circumventing." To me it doesn't take into
10 account whatsoever how strong something is, how good something
11 is, how hard it is to break. I don't know, for example, if
12 somebody had an encryption scheme that was what I call a
13 "cereal box" encryption scheme where you replace one letter by
14 another. Do you remember? I don't know if you remember
15 those. I'm old enough to remember those.

16 MR. KAHLE: Decoder ring.

17 DR. SIMONS: Yes. Now, one of the reasons that
18 this was a challenge to kids is that it was pretty easy to
19 break, right? Now, if somebody produced a document which was
20 protected by such a scheme and somebody else showed the key,
21 is that in violation of the DMCA? I honestly don't know.

22 And I think when you get to that level of
23 uncertainty, it has an incredibly chilling effect.

24 Now, I know it's not up to you to change the way
25 this law was written, so I'm really just sort of ranking, I

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1 suppose, about the kinds of issues that we've been confronted
2 with. And to the extent that you could help us by broadening
3 these exceptions or making them as all encompassing as
4 possible, that would be very useful.

5 I mean, I still think there's a fundamental
6 flaw. Instead of saying we want to outlaw infringing behavior,
7 we're saying we are outlawing technologies except. And when
8 you get to those excepts when you're dealing with
9 technologies, you run into trouble.

10 I'm not sure if I've answered your question.

11 MR. TEPP: Well, you have and you've actually
12 provided a good segue to my next question.

13 DR. SIMONS: Okay. Good.

14 MR. TEPP: Because I think what you said is
15 fair, that some of your concerns appear to go beyond the scope
16 of what this rulemaking is.

17 DR. SIMONS: I understand, yes.

18 MR. TEPP: And certainly have respect for your
19 views, and they're important issues, but in trying to focus on
20 exactly what --

21 DR. SIMONS: Of course.

22 MR. TEPP: -- Congress has instructed us to do,
23 when I heard your three examples that you described in your
24 opening statement they were all concerned with distributing
25 the results of research, sending out papers, giving lectures,

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1 that sort of thing. That struck me as not something that
2 falls within the act of circumvention, 1201(a)(1), which is
3 what this rulemaking is about, but more likely into
4 1201(a)(2). And I wanted to give you the chance to tell me I'm
5 wrong. And if so, why. Or if not, tell me exactly what it is
6 within 1201(a)(1) that this rulemaking is about that you're
7 asking of us and why.

8 DR. SIMONS: Well, people said they're not doing
9 research anymore in these areas? That's 1201(a)(1). The
10 doing of the research is 1201(1)(1). Now, it's true that I
11 think most scientists like to have their work known and
12 acknowledged, and even praised when possible. And so -- and
13 there's definitely a lot of ego in what people do and that's
14 why they do want to publish. But the fact is that the actual
15 work is not being done. And as a result, the systems and all
16 the software that should be being tested is not being tested.

17 I mean, you can imagine for example a scenario
18 in which somebody did the 1201(a)(1) type of work and
19 discovered some sort of major flaw. Now, the dissemination of
20 that information might be illegal under another part of the
21 DMCA. But the fact that there's a flaw, saying that there's a
22 flaw not be illegal, right? I mean to simply say that there
23 is a flaw without explaining what it is should be, as I
24 understand it, legal. So if -- you know, to the extent that
25 we all want to make our computer infrastructure, the whole

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1 information infrastructure more secure and to the extent that
2 we want to encourage people to testings for vulnerabilities
3 and to expose problems and to warn people of problems, then I
4 think that it is relevant.

5 I mean, I also would like to see more broadening
6 of the exemptions. But even being able to warn people that
7 there are problems, I think would fall into this. And I think
8 in the case of the people who wrote me, that their frustration
9 comes -- is related to that. Because as scientists they
10 assume, of course, it's not sufficient to someone, you've got
11 to prove it. But there's this middle step of warning which is
12 also not available to us now.

13 Is that answering --

14 MR. TEPP: Well, it's another step towards what
15 I'm looking for. What you're describing is a set of people
16 who are fairly well known in the field, so that's not a
17 problem at least for this part of the discussion. And they
18 find something. Oh, my gosh, there's something terribly
19 wrong. And I don't disagree with your analysis that they could
20 say I found a flaw. When they say what it is, that's a
21 different question.

22 DR. SIMONS: So.

23 MR. TEPP: So they say, you know, the
24 hypothetical is a well-known researcher does the research,
25 finds the flaw, announces that they found a flaw. The

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1 proprietor of the software involved is informed. He says oh
2 my gosh, thank you so much. And the flaw is fixed.

3 DR. SIMONS: Yes.

4 MR. TEPP: That sounds like it probably could
5 fall into a 1201(g) situation. Well, it seems like that
6 could. DO you think --

7 DR. SIMONS: Well, (g) is encryption, right? I
8 mean, there are all kinds of other flaws that have nothing to
9 do with encryption.

10 MR. TEPP: Okay. So that is what -- what are
11 you asking us for? That's what I'm trying to get to.

12 DR. SIMONS: What am I asking you for? Well,
13 this is where I could use -- I would like to have you.

14 I guess what I'm saying is that we need whatever
15 help you can provide us to make it easier for us to do our
16 jobs, to make it easier for the computer security and
17 encryption communities to do what they had been doing before
18 the DMCA was passed. To make sure that people -- that
19 researchers at UC Berkeley, for example, don't have to spend
20 more time talking to lawyers than doing the actual research.

21 I don't know how you can do that. I was hoping
22 that I would come and show you the problems and you would tell
23 me how you could do it. But that's, I'm sure, not
24 appropriate.

25 As an example, Sun -- just to give you an

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1 example of what I think is a good kind of situation.

2 Sun Microsystems has a policy where if people
3 find flaws in their software, they give them \$100 or
4 something. And they encourage. And they figure that that
5 makes their software more secure. That's a very enlightened
6 position and it means that people can go and do reverse
7 engineering of various aspects of Sun software and not have to
8 worry about being dragged into court. But other companies
9 don't necessarily have that approach. And as a result, I
10 think, sometimes their software is less secure because they
11 don't get this positive input from the community. By the way,
12 many of whom are not computer scientists with a capital C
13 capital S.

14 So I don't know to what extent you have the
15 ability to even go back to Congress and make suggestions to
16 them as to things that could be changed or should be changed.
17 But we have a real problem.

18 I'll just tell you a little anecdotal story. I
19 was on the Hill last year with a couple of people from -- the
20 two people who are in our office, the USACM office. And we
21 went into a cafeteria in the House for a snack. And the tables
22 were occupied so we asked this woman if we could sit next to
23 her, and she said yes.

24 And we started talking. She was there to lobby
25 for some sort of medical thing. But we were talking. It turned

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1 out she was involved with the committees that were doing the
2 negotiations on the DMCA, like I think between the House and
3 Senate, you know, when they were doing the negotiations. And I
4 suddenly had this insight. I said "Did they delay the
5 implementation of the anticircumvention and anti-dissemination
6 provisions until 2000 because of the Y2K problem?" And she
7 said yes.

8 I didn't get her name. I'm kicking myself. I
9 did have witnesses, but that was what she said. That they knew
10 about Y2K. And either the people who knew about it thought
11 that this was a unique problem that would never reoccur, or
12 they didn't care.

13 I'd like to think that they thought it was
14 unique, but we as computer scientists know that it's far from
15 unique and that these kinds of problems are constantly
16 reoccurring. And to the extent that you cannot do some of the
17 sorts of reverse engineering and circumvention that was done
18 to solve the Y2K problem because of the DMCA, we are at
19 greater risk.

20 And probably didn't answer your question. I'm
21 sorry.

22 MR. TEPP: Well, we're not computer scientists
23 even with a small C and small S. And so given that there is a
24 burden that has to be met in order to demonstrate a need for
25 any new exception that we're being asked to recommend to the

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1 Librarian, it makes our job nearly impossible if the
2 proponents of the exceptions can't articulate an exception for
3 us to consider.

4 MR. KAHLE: May I suggest?

5 DR. SIMONS: Yes.

6 MR. KAHLE: Would it be acceptable if the ACM
7 were to submit within one week -- potential 3 days -- 2 days.

8 MR. CARSON: It's too late, folks. We're way
9 past the point of proposing exemptions. But you've got one in
10 writing. It's in front of us.

11 DR. SIMONS: I beg your pardon?

12 MR. CARSON: You've proposed an exemption to us
13 in writing. It is in front of us.

14 DR. SIMONS: Yes.

15 MS. PETERS: We need to actually end this panel.
16 We're way past.

17 We have to be out of this room at 5:00. That's
18 a given. So we're going to take a 45 minute break and we'll
19 start again at 2:15. Thank you.

20 (Whereupon, at 1:30 p.m. the meeting was
21 adjourned until 2:15 p.m.)

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2: 20 p.m.

MS. PETERS: The panel is here, and since all the witnesses are here, let's start. This afternoon we're going to be focusing on sound recordings and musical works that are on copy-protected CD's. And the witnesses are from the Electronic Frontier Foundation, Gwen Hinz, and Ren Bucholz, and from IP Justice, Robin Gross. And then the other side, Steve Marks from the Recording Industry Association of America, and Mark Belinsky, Macrovision.

So let's start with EFF, however you want to divide it up between you.

MS. HINZE: On behalf of the Electronic Frontier Foundation, I'd like to thank you for the opportunity to testify at today's hearing in support of the exemption the EFF has proposed.

My name is Gwen Hinz, I am the staff attorney at the Electronic Frontier Foundation and I'm here today assisted by Ren Bucholz, our staff activist.

EFF has requested an exemption for sound

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1 recordings released on audio CD's that are protected by
2 technological protection measures that malfunctioned, so as to
3 prevent access on certain playback devices.

4 The proposed exemption would allow consumers to
5 play music that they have legitimately acquired without fear
6 of legal liability under Section 1201. The exemption is
7 effectively identical in scope to the second exemption that
8 was granted by the library in 2000 for literary works that are
9 subject to access control measures that prevent access due to
10 malfunction, or damage or obsolescence.

11 The idiosyncratic and varying nature of the
12 recorded malfunctions of various copy-protected CD's, working
13 on some PC's and not other operating systems, suggests that
14 the copy control technological protection measures were
15 intended to prevent unauthorized reproduction but were not
16 designed to prevent playback of music.

17 However, irrespective of the intent of these
18 measures, the practical effect of these malfunctioning copy
19 protection controls has been to prevent consumers from
20 accessing protected music.

21 The inability to access or play the music is due
22 to a technological protection measure failing to work in the
23 way that it was intended to work.

24 MS. DOUGLASS: I must ask that you try to speak
25 up a little. I can see people are moving forward in the back.

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1 MS. HINZE: Thank you, thank you. EFF is
2 seeking a narrow exemption that would permit consumers to take
3 the steps necessary to play music that they have legitimately
4 purchased on the consumer playback devices they own. This is
5 clearly a non-infringing use. Playback is a private
6 performance and does not implicate any of the exclusive rights
7 granted to copyright owners under Section 106 of the copyright
8 statute.

9 The proposed exemption that we are seeking is
10 narrow. It is limited to restoring playability and would not
11 authorize copying of affected music.

12 I'd like to spend the bulk of my opening
13 statement addressing some of the points that are being made in
14 opposition to our exemption by, amongst other people, the
15 Joint Commenters, represented this afternoon by Mr. Marks.

16 In the Joint Reply Comments filed with the
17 copyright office, the Recording Industry Association of
18 America, and the various other commenters, have opposed this
19 exemption on three main grounds.

20 First, they have argued that the proposed
21 exemption is outside the scope of this rulemaking process
22 because the copy protection technology issue is not a
23 technological protection measure that effectively controls
24 access to a protective work under Title 17 for the purposes of
25 Section 1201(a)(1) and as per our discussion this morning,

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1 1201(a)(3)(b) of the copyright statute.

2 EFF does not dispute this. As we noted in the
3 comments filed in December 2002, based on the information that
4 we had that is publicly available about the nature and the
5 operation of these measures it does not appear that they
6 require application of information, a process, or a treatment
7 with the authority of a copyright owner to play when they
8 play.

9 And when they don't play, it doesn't appear to
10 be a matter of a failure to apply a particular process
11 information or treatment in order to make that malfunction
12 correct. The blocking of access here is due to the
13 malfunctioning copy protection controls, and it appears to be
14 unintentional.

15 However, as demonstrated by the legal debate
16 over the status of the content scrambling system in relation
17 to DVD's over the last five years, a technological protection
18 measure can control both access to, and use or copying of a
19 protected work.

20 There is uncertainty within the legal community
21 as to whether malfunctioning copy control technological
22 protection measures that inadvertently prevent playback of CD
23 content should be characterized as effective access control
24 measures for the purposes of Section 1201(a)(3)(b). The legal
25 uncertainty here is exacerbated by the lack of public

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1 information by exactly how these technologies work.

2 In the meantime, however, consumers are, if they
3 find that they have purchased copy protection CD's that do not
4 play in their playback devices, are left in a legal no-man's-
5 land. Whether or not a malfunctioning copy protection measure
6 is deemed to fall within the technical definition of
7 effectively controlling access in Section 1201(a)(3)(b), the
8 end result is exactly the same thing for consumers.

9 Where the copy protection technology
10 malfunctions, it often blocks access completely and consumers
11 are simply unable to play music that they have lawfully
12 acquired.

13 However, given the doubt that surrounds the
14 scope of application of Section 1201(a)(1), consumers can't be
15 sure whether they're breaking the law and potentially putting
16 themselves at risk of significant liability legally if they
17 try to circumvent the malfunctioning copy protection
18 technology to make the CD play.

19 If the Register were to clarify in its
20 rulemaking that malfunctioning copy controls are not access
21 controls for the purposes of Section 1201, then EFF agrees
22 that the proposed exemption would not be required.

23 However, in the absence of a clear statement
24 about the scope of Section 1201, or an exemption, there's no
25 guidance for consumers or predictability as to what behavior

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1 is lawful when they're trying to make a very common non-
2 infringing use of music they've purchased.

3 There is, in addition, a flow-on effect, a
4 consequent chilling effect on manufacturers and software
5 vendors who might otherwise develop devices or software
6 drivers, the current drives, and current CD ROM and DVD
7 players that would be capable of playing these non-raybook
8 (phonetic) audio CD's. For instance, in the absence of a
9 clear statement or a clear exemption, Apple may be less
10 inclined to release a software update that would permit MAC
11 users, a particularly affected group, to play these types of
12 disks on their computer CD ROM drives.

13 The second main argument that our clients have
14 made is that EFF has not met its burden of proof on these
15 issues. It hasn't met the burden of showing how amounting to
16 a substantial adverse impact. In particular, the Joint
17 Commenters complain that we have not provided evidence of the
18 number of copy-protected CD's currently in circulation in the
19 United States, or evidence as to the frequency of actual
20 failures of these disks on particular types of devices. I have
21 several comments in response.

22 First, it is not clear at all what is necessary
23 to meet the standard of proof of substantial adverse impact
24 for this category. However, EFF does not agree with the
25 direct commenters' assertion that this requires us to provide

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1 exhaustive figures for the number of copy-protected CD's
2 released in the United States. And the failure rate of that
3 technology in particular, devices.

4 If the Copyright Register in the Librarium were
5 to endorse that standard as the standard for substantial
6 adverse impact, we believe it would raise serious issues about
7 the equity of this proceeding and the ability of consumers to
8 participate meaningfully in this process. It would certainly
9 threaten to undermine Congress's intent to create a fail-safe
10 mechanism for consumers, non-infringing users.

11 The reason I say this is for these reasons:
12 First of all, consumers' experience of identifying a copy-
13 protected CD is much like playing a game of battleship.

14 Since copy-protected CD's are often not labeled,
15 consumers do not know whether any CD they purchase is copy-
16 protected or not until they insert it into their computer CD
17 ROM drive or their car CD MP3 player, or their DVD player, and
18 then experience a malfunction.

19 In this case, in this present exemption, the
20 only parties in a position to obtain comprehensive information
21 as to the number of copy-protected CD's that have been
22 released in the United States are those opposing the
23 exemption, including the RIAA and its member labels.

24 However, they have chosen not to disclose that
25 information in response to the information that the EFF has

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1 provided. Even though it could presumably be used to prove
2 that the exemption is unwarranted, if the number of copy-
3 protected CD's actually in circulation is diminimus, as they
4 have suggested.

5 It's also difficult to provide information as to
6 the frequency and type of malfunction of these copy protection
7 measures on particular types of devices. As the 48 consumer
8 comments that were filed with the copyright office in this
9 proceeding illustrate, the range of failures that people
10 experience vary dramatically. In some cases, people are able
11 to play one particular song for a small segment, or not play
12 anything at all. In some cases, people experience a complete
13 operations system crash. It happened to my colleague and has
14 been reported to be the case in a number of the comments filed
15 in this proceeding.

16 Given the variation amongst the different types
17 of responses, and the fact that it seems to be a matter of
18 operating system to operating system, drive by drive, it's a
19 very difficult thing to predict or to qualitatively assess
20 what the frequency or type of failure is.

21 More importantly, EFF considers that the
22 information that's currently on the record is sufficient to
23 establish current substantial evidence impact.

24 At a qualitative level, there is a substantial
25 evidence impact on the consumer. Consumers use a non-

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1 infringing use of lawfully acquired material when copy
2 protection technology malfunctions, and they are entirely
3 prevented from playing back something they've lawfully
4 acquired. The nature of the harm experienced here is absolute
5 if there is no playback. It's not merely an inconvenience.
6 The customer receives nothing, no benefit for their bargain.

7 Qualitatively speaking, evidence on the record
8 indicates that a number of copy-protected CD's have currently
9 been released in the United States. EFF identified titles of
10 four copy-protected CD's that had been verified as copy-
11 protected in our December 2002 comments. However, based on
12 news reports and consumers' experiences, the actual number of
13 affected titles may be much higher.

14 News reports indicate that covert trials of
15 unlabeled copy-protected CD's have been taking place in the
16 United States since 2001. My colleague, Ren, is currently
17 showing a slide with excerpts from these news reports.

18 In July 2001, Macrovision reportedly made a test
19 release in the United States, including one title that had
20 sold almost 100,000 units. This followed a report in May
21 2001, which quoted Mark Tokayer, the CEO of Macrovision
22 partner, TTR Audio, as stating that Macrovision and a major or
23 several major record labels had released copy-protected CD's
24 in California. In February 2002, technology company Midbar,
25 which is now owned by Macrovision, announced that it had

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1 released 10 million CD's in the United States and Europe. And
2 last month, Macrovision announced its technology had been used
3 on over 100 million CD's worldwide, including in the United
4 States.

5 The record industry has unofficially
6 acknowledged the existence of two copy-protected CD's in the
7 U.S. market. Yet we know from firsthand experience that this
8 is incomplete. One of (indistinguishable) staffers purchased
9 a CD by the group The Donners, only to discover that it was
10 copy-protected.

11 This disk has not been acknowledged by Atlantic
12 Records as being copy-protected, but if you look very, very
13 closely, you can see a tiny, tiny, tiny logo down at bottom
14 here, which appears to be a copy protection logo. It's on the
15 actual packaging, not on the disk itself.

16 The disk itself actually says that it will play
17 on various computer formats, including MAC OS players. In
18 point of fact, it wasn't able to be played at all on MAC OS
19 drive in question, which is why this this eager staffer worked
20 out. (indistinguishable) It was copy-protected and found the
21 logo.

22 This seems to match the experience of hundreds
23 of consumers in online fora (sic) who have identified what
24 appear to be copy-protected CD's who have experienced and
25 identified these as being CD's that are not capable of playing

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1 on various devices.

2 It's fair to assume that these experiences and
3 those of the 48 consumer commenters who filed comments in this
4 proceeding indicate that the number of copy-protected CD's in
5 the U.S. market may actually be much higher than has been
6 officially acknowledged by the record industry, and that the
7 number of these disks will increase in the next three years.

8 The increasing copy volumes-- increasing volumes
9 of copy-protected releases will have a substantial and adverse
10 impact on consumers' ability to make non-infringing uses of
11 their works within the next three years.

12 First, record label and technology company
13 statements indicate that there are a significant number of
14 copy-protected CD's who will be released in the United States
15 this year.

16 Second, because of the move towards more modern,
17 multi-format disk players as primary playback devices, such as
18 DVD's, MP3's, CDR's, combined and X-Box game consoles,
19 combined multi-format playback devices of these types have
20 much more vulnerability to the current copy protection
21 technologies because the technologies appear to work by
22 exploiting differences between audio CD players and these
23 types of multi-format players as discussed in the report that
24 cited in (indistinguishable) comments, a research paper by
25 Princeton researcher, John Alexander Halderman. And as

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1 (indistinguishable) said the comments point out there has been
2 a squished move by consumers to adopt multi-format playback
3 devices such as combined DVD and MP3 CD players. MSNBC
4 reported last year that sales of standalone regular CD players
5 were down 48.1% last year.

6 Ren is showing slides with excerpts from news
7 reports about the expected influx of millions of copy-
8 protected CD's into the U.S. market in coming months.

9 In late March 2003, these reports indicated that
10 the BMG subsidiary, Arista records, would be releasing
11 SunnComm protected CD's in the United States later this year.

12 In November 2002 the L.A. Times reported EMI
13 recorded music Vice President, David Munns, as saying that the
14 2002 holiday season would be, as you can see, would be the
15 last holiday season without wide-spread use of copy protection
16 technology on new releases.

17 And technology company SunnComm has stated that
18 it has already installed anti-copying gear in a
19 Bertlesmann subsidiary, North Carolina CD manufacturing
20 plant, and that a sizable proportion of this
21 subsidiary's releases will be copy-protected by the end
22 of 2003.

23 The third main argument made by our opponents is
24 that this exemption is premised on an incorrect assumption
25 that consumers are entitled to play copy-protected music on

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1 any device capable of using CD's as a data storage format.

2 On page 19 of the joint comments, our opponents
3 have argued that "neither the copyright act nor the DMCA was
4 ever intended to require or to confer upon uses a rash of
5 complete compatibility amongst all devices in our media."

6 That was a quote from those comments.

7 They then claim that the existence of playback
8 devices that can play copy-protected music removes any need
9 for this exemption. I'd like to make several comments in
10 response to that.

11 First, I'd like to emphasize that the nature of
12 the exemptions sought here is for non-infringing use of
13 lawfully -- of playing lawfully acquired sound recordings.
14 Private performance is not one of the rights given to
15 copyright holders under Section 106 of the copyright act.

16 Our opponents argument about compatibility
17 precedes on the assumption that copyright owners are entitled
18 to control playback. Only users play it-- only users play
19 (indistinguishable) device.

20 However, there's nothing in the legislative
21 history of the DMCA that indicates that Congress intended to
22 grant additional rights to copyright artists,
23 (indistinguishable) mostly stated in Section 106.

24 EFF would submit that any opposition to this
25 exemption, which is premised incorrectly on copyright

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1 owners, claim to control rights beyond what's listed in
2 Section 106, should be treated with caution.

3 The second, contrary to our opponents claim,
4 what is sought here is not a right of complete compatibility
5 for all devices and all media. Instead, the requested
6 exemption would allow consumers to make a non-infringing use
7 of media they've lawfully acquired on devices they currently
8 own. And that they would reasonably be expected -- would be
9 able to play that media based on 15 years' experience -- of
10 over 15 years' experience of the audio CD format. After all,
11 what we're talking about here is consumers putting CD's into
12 devices that have previously played CD's, not putting them
13 into toasters.

14 It's certainly true that Congress did not intend
15 to mandate manufacturers to design devices to detect and
16 respond to technological protection measures that were
17 implemented by copyright owners. That's reflected in 1201 C3.

18
19 However, nothing in the Congressional Record
20 indicates that Congress intended to grant copyright owners the
21 right to control consumers non-infringing private performance
22 of lawfully acquired content on devices they already own. The
23 existence of some players that can play these disks is not a
24 sufficient reason for the client to grant this exemption.

25 Consumers seeking to make non-infringing uses of

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1 works they've lawfully acquired should not be put to the
2 expense of having to purchase an additional player to play
3 protected music. And as I previously noted, the stock of
4 players which can actually play these types of disks is
5 diminishing as consumers are moving towards more modern multi-
6 format players, DVD's, MP3's, CD's, X-Box game consoles.

7 Before the existence of alternative players that
8 consumers can currently purchase, but may not be up to easily
9 acquire in three years' time, as these devices are phased out,
10 doesn't protect consumers' ability to make non-infringing uses
11 of these works within the next three-year period.

12 Finally, in considering the balance of harms
13 involved in granting this exception, I'd like to emphasize
14 that the exemption does not increase the risk of widespread
15 copyright infringement.

16 First, the exemption is limited to non-
17 infringing playback of protected music. Second, as Section
18 1201(a)(1)(d) makes clear, any exemption that is granted by
19 the Library of Congress extends only to non-infringing
20 behavior. The exemption would allow consumers to take steps
21 to restore playability, but would not authorize otherwise
22 infringing reproduction. If any consumer were to step beyond
23 the bounds of the exemption, and, for instance, make an
24 unauthorized reproduction or distribution of a work on a
25 protected music CD, copyright owners would continue to have

1 the right to bring an action for infringement, and would
2 continue to have the full set of rights apparently available
3 to them under copyright law.

4 Finally, I'd just like to address one point that
5 was made in the comments of Mr. Metalitz this morning, when he
6 provided his summary of the factors that the copyright office
7 had to take into account. He suggested that in the context of
8 the copyright office's mission, the copyright office had to
9 consider the availability for use of works in the class, as
10 identified, and he made a statement to the effect that we have
11 a digital cornucopia of it if you look at the situation in
12 2003 as compared to the situation in 2000.

13 We have a rich variety, more works, more
14 different types of works available. And that this is
15 primarily due to the use of technological protection measures
16 backed by the legal sanctions of Section 1201.

17 I'd just like to comment on that in relation to
18 this particular class of CD's and note that -- sound
19 recordings, and note that that's just not true with music.
20 Music has been around in many forms for many years, and the
21 availability of music does not actually have anything to do
22 with the technological protection measures that have only
23 started to be used on what looked like CD's in the last two
24 years.

25 In fact, the music format that we know as the CD

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1 has been around in existence for over 15 years. And so, to
2 the extent that the copyright office wants to take into
3 account the consideration about the user facilitation or the
4 availability of facilitation on any particular technological
5 protection measures, I would urge the copyright office to take
6 into account that that is not actually accurate or not an
7 appropriate factor for consideration in respect of this class
8 of works. Thank you.

9 MS. PETERS: Miss Gross?

10 MS. GROSS: Good afternoon. IP Justice welcomes
11 this opportunity to testify to the US copyright on this about
12 the adverse impacts users are experiencing in their ability to
13 enjoy CD's and other sound recordings in non-infringing ways.
14 The cause of this adverse impact is the technological
15 restriction measures currently being applied, with increasing
16 regularity, to CD's by the record industry.

17 The magnitude of this harm warrants the
18 declaration by the U.S. copyright office that the exemptions
19 proposed by IP Justice in its submitted comments. Before
20 speaking to the substantive reasons for our proposed
21 exemptions, IP Justice wishes to highlight four important
22 procedural issues in relation to this rulemaking.

23 First, the Librarians' responsibility in this
24 rule-making is to users and not copyright owners. In the
25 first rulemaking in 2000, the Librarian gave undue deference

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1 to the interests of copyright owners. By doing so, the
2 Librarian duplicated Congress's deference to the interest of
3 copyright owners when Congress first enacted the anti-
4 circumvention measures in 1998.

5 The role of the copyright office in this
6 proceeding is not to determine that technological restrictions
7 benefit the public, but to look for ways in which the public
8 is harmed by them, and act to preserve the public's rights
9 under traditional copyright.

10 Congress introduced the anti-circumvention
11 measures to encourage copyright owners to make their works
12 available digitally. Or in the words of the last rulemaking,
13 "The measures are designed to be use facilitating." The
14 responsibility of the Librarian in this rulemaking is not to
15 repeat Congress's analysis, but to protect users and ensure
16 access, not availability of protected works such as CD's.

17 Second, the structure of this rulemaking, as
18 interpreted by the Librarian, effectively precludes it from
19 achieving its purpose. The Librarian insists that exemptions
20 be defined according to class of work. Adequate protection of
21 users' rights requires that exemptions be drafted with
22 reference to the type of user and circumstances of use.

23 For example, if a person listens to a CD at
24 home, they're not infringing the copyright owners' public
25 performance right. But when they play the CD in a

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1 discotheque, they might be. As scholars and civil
2 libertarians have noted, architecture is policy and the
3 structure of this proceeding makes it extremely difficult to
4 obtain consumer protections.

5 Third, the Librarian has set an impossibly high
6 evidentiary standard, given the nature of the harm it is
7 supposed to protect against. The Librarian requires evidence
8 of substantial harm or likelihood of harm but without any
9 guidance as to how to meet these thresholds.

10 The adverse effects experienced by users are
11 likely, of their very nature, to be individual, and personal,
12 difficult to measure and quantify. This does not detract from
13 the existence of such harm. It does mean that the Librarian
14 should accept, as sufficient evidence, news reports and
15 principal analysis of likely harm which take into account the
16 interaction of the anti-circumvention measures with the
17 limitations and exceptions for users, under traditional
18 copyright principles.

19 Fourth, IP Justice urges the copyright office to
20 be mindful in conducting this second rulemaking of two
21 important facts. Firstly, the first rulemaking was conducted
22 when the prohibition on access circumvention had not yet taken
23 effect. Three years later, the trend of digital lock-up is
24 more apparent. Thus, the extent of the impact on users must
25 be greater because the anti-circumvention measures are broader

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1 than copyright.

2 The second important factor is that the impact
3 of any exemption will necessarily be limited. This is
4 something which the Librarian failed to take in account in the
5 first rulemaking. Acts of circumvention and access controls
6 are, by their nature, inherently non-commercial and personal.
7 Anyone who seeks to take advantage of an exempted act of
8 access circumvention, must be highly, technically, literate.

9 Even where exemptions to the general ban are
10 granted, a person still cannot acquire a circumvention device
11 or service from a third party nor make it available to someone
12 else because to do so would infringe the anti-trafficking
13 prohibitions of Section 1201. This means that only a limited
14 number of people are likely to be able to avail themselves of
15 any exemptions. Thus the impact on the copyright owner of any
16 exemption will be substantially limited.

17 Turning now to our substantive comments in
18 support of our proposed exemptions for copy-protected CD and
19 other sound recordings, IP Justice would like to make two
20 comments.

21 First, CD copy protection often serves
22 functionally also, as access restriction technology. The
23 technology restricts the ability of users to play a CD in
24 certain types of technology, for example, a PC. This is a
25 clear interference with access but CD owners are forbidden

1 from bypassing the access control technology.

2 Users are unable to simply enjoy a CD in the
3 privacy of their own home, office, or car, on the platform of
4 their choosing. Instead, the copyright owner dictates the
5 user's personal experience of music, something well beyond the
6 ambit of Section 106 in the copyright act.

7 The focus on Section 106 is on public uses of
8 music and intellectual property. That which falls outside of
9 the public sphere, the private enjoyment of music, should
10 likewise fall outside the reach of the copyright owner's
11 control. CD copy protection permits copyright owners to usurp
12 the user's private performance right through the use of these
13 technological access controls that double as use in copy
14 controls.

15 The DMCA distinguishes between circumventing
16 access controls and circumventing copy controls. It allows
17 circumvention of copy controls in order to engage in fair use.

18
19 In passing the DMCA, Congress clearly intended
20 the public to continue to enjoy their right to circumvent copy
21 controls on sound recordings for lawful purposes.

22 So while in theory, consumers continue to enjoy
23 their right to circumvent copy controls to make fair use or to
24 engage in other lawful uses of sound recordings, the law still
25 forbids bypassing access technology. And since it's not

1 possible to bypass the copy controls without also bypassing
2 access controls with these dual use technologies, consumers
3 are prevented from exercising the right to bypass the copy
4 controls on sound recordings in order to make the lawful use
5 of their music.

6 Secondly, CD copy protection chills innovative
7 personal uses of music. Digital technology empowers people to
8 access their music collection in unprecedented new ways
9 without being a pirate. Purchasers of CD's can space shift or
10 play shift their music from one device to another, for
11 example, to their MP3 player, to go jogging or their home or
12 their car office.

13 CD copy protection technology prevents this from
14 occurring. It treats all users as copyright infringers. The
15 trend of legitimate music purchasers being unable to access
16 copy-protected CD's is well established and will only
17 continue.

18 Surely, the hundreds of comments supplied by
19 individuals complaining of this surreptitious practice during
20 these proceedings established this substantial harm.

21 IP Justice urges the copyright office, mindful
22 of the limitations of this rulemaking and its duty to users,
23 to declare proposed exemptions, enabling the lawful enjoyment
24 of music and restoring consumer freedoms. Thank you.

25 MS. PETERS: Thank you. Mr. Marks?

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1 MR. MARKS: Good afternoon. My name is Steven
2 Marks and I'm senior vice president of Business and Legal
3 Affairs for the Recording Industry Association of America.
4 Thank you for the opportunity today to present the views of
5 the RIAA concerning the exemptions that have been proposed by
6 EFF, Public Knowledge, and IP Justice.

7 The proponents case for these exemptions boils
8 down to complaints of a few people that appear to stem from
9 technical incompatibilities, not access controls, relating to
10 a very few number of sound recordings.

11 These complaints do not support the exemption
12 that they request. The proponents themselves admit that their
13 complaints are not based on technical protection measures that
14 are access controls, thereby taking their claims outside the
15 scope of this proceeding.

16 The proponents have failed to present sufficient
17 evidence to support an exemption, even under the most lenient
18 of evidentiary burdens, let alone the extraordinary
19 circumstances that are required here. And the proposed
20 exemption is overbroad.

21 But before addressing these in detail, let me
22 first say a few words about the use of technical protection
23 measures by record companies.

24 Record companies are focused on providing access
25 to their music in as many ways as possible. They are in the

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1 business of selling music, regardless of platform or delivery
2 channel, and are making music available in more formats than
3 ever before. Record companies would like to do this in a way
4 that is not susceptible to easy copying and widespread
5 distribution of further copies.

6 In light of the piracy that has devastated the
7 industry in recent years, through cutbacks in artist rosters,
8 lay-offs, retail store closings, some would say that CD copy
9 controls are necessary to ensure that the industry continue to
10 invest in new artists and continue to bring music to
11 consumers. This is consistent with Congressional intent of
12 the DMCA, to encourage copyright owners to continue to invest
13 in creative works.

14 Record companies understand, however, that
15 success depends upon their ability to make consumers happy and
16 to distribute recordings widely. They realize that locking up
17 content is not a solution.

18 CD copy protection technology is evolving
19 quickly and one can only speculate how market forces and
20 technological developments will affect the actual application
21 of technical protection measures to CD's.

22 The register of the Librarian should not, on the
23 basis of this speculation, grant an exemption that would deter
24 innovation and thwart efforts to control piracy, but should
25 instead allow the marketplace to work for the coming triennial

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1 period.

2 Let me go through the individual reasons why the
3 -- substantively, why the exemptions should be denied. The
4 first is that the proponents simply failed to state a claim
5 for an exemption. The complaint, EFF's complaint, for
6 example, is about the purported malfunction of copy controls,
7 not access controls.

8 Indeed, EFF states that it does not believe that
9 the technology that is the subject of the proposed exemption,
10 quote, "effectively controls access to a work." Having denied
11 an element of the case it is required to prove, EFF's claim
12 should be rejected.

13 EFF proposes an exemption for copy-protected
14 CD's that malfunction to prevent access, but the malfunction
15 of a copy control does not convert it to an access control.
16 Moreover, EFF has presented no evidence that the copy control
17 indeed malfunctioned.

18 IP Justice has requested an exemption for
19 copying to different platforms or different devices. Aside
20 from the fact that there is no right of access on all devices,
21 as I will explain a little bit later, this proposed exemption
22 is again about copying, not access, and therefore is outside
23 the scope of the proceeding.

24 The proponents have also failed to identify the
25 technologies with particularity, and to establish that they

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1 have had or are likely to have substantial adverse effects on
2 use of a properly defined class of works. Instead, they have
3 asked for an exceptionally broad exemption, covering an entire
4 category of works identified in Section 102A of the copyright
5 act. They have also improperly included a broad swath of
6 diverse technical protection measures.

7 The Librarian should resist this invitation to
8 extrapolate alleged problems with some technologies to all
9 current and future technologies.

10 The proponent's exemption is also misguided in
11 that it is predicated on the assumption that users, or
12 consumers, have an unqualified right to access works on any
13 device of their choosing. The copyright office has found that
14 no such right exists, and that diminutive or isolated problems
15 or mere inconveniences do not justify an exemption. There is
16 nothing in the DMCA or the fair use doctrine that's intended
17 to ensure access to every work in every format.

18 Ensuring access on every device is simply not
19 the purpose of this rulemaking, either. The ability to make
20 non-infringing uses, even if not in the preferred or optimal
21 format, is sufficient to satisfy the statutory factor of the
22 availability for use of copyrighted works.

23 Let me take a minute to talk about the evidence
24 itself, of adverse effect, that has been presented by the
25 proponents. They have failed both to meet their burden that

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1 today there is an adverse impact or that there is likely to be
2 one in the future. Focusing on the present, there have been
3 125,000 albums released in the last three years. 125,000, and
4 only nine have been released in the U.S. that have technical
5 protection measures.

6 Seven of those were by Universal Music Group,
7 all of them were prominently labeled. There were toll free
8 customer help telephone numbers and web sites. And the
9 complaints of those CD's, according to Universal, were from
10 less than one tenth of one percent of the CD's that were sold.
11 This is generally consistent with complaints about CD's that
12 are released that have no technical protection measures.

13 So that's seven of the nine. Another one was by
14 Music City Records. The tracks on that CD were made available
15 for downloading.

16 And then the final one was by a company called
17 Metropolis. There the CD was imported from Germany, was not a
18 U.S. release. It was an import from Germany. And
19 subsequently, Metropolis made a U.S. release without the
20 technical protection measures.

21 The reply comments identify 45 titles in those
22 comments. Of these 45, 28 were not released in the U.S. with
23 copy or access controls. Four were not even CD's. Five were
24 foreign releases. Five were too vague for us to gather
25 evidence to determine which category they might fall in, and

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1 only three of them contained any kind of technical protection
2 measure.

3 The complaints appear to simply be the result of
4 technical incompatibilities. Despite the sophistication of CD
5 technology, not every disk will play in every machine. That
6 may be regrettable, but it's certainly not the basis for an
7 exemption pursuant to this proceeding.

8 The proponent's have not alleged the problems
9 complained of were even commonplace for those CD's. As
10 mentioned on some of the ones that were sold by Universal, the
11 complaints were less than one tenth of one percent. The
12 incompatibilities or the defects could be from defects in
13 manufacturing, which are clearly not the basis of an
14 exemption. And there's generally no evidence that's been
15 presented that the problems with any of these CD's is any
16 greater than on CD's generally, without any such technical
17 protection measures.

18 The proponent's have also failed to establish
19 that there is likely to be a substantial adverse effect on
20 non-infringing uses. An exemption based on anticipated
21 adverse impact can be only in extraordinary circumstances,
22 where the evidence supporting the exemptions highly specific,
23 strong, and persuasive.

24 They have failed to establish that adverse
25 impacts are more likely than not. Speculation, conjecture

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1 about new releases, are simply inefficient.

2 For example, EFF stated that no record company
3 had renounced technical protection measures. They have
4 presented quotes today, but it is speculation that any of the
5 technologies that may be used -- and we don't know what
6 technologies will be used -- how those technologies will work
7 at all. And again, those were based on copy controls, not
8 access controls, all of the statements.

9 Finally, the speculative allegations of harm are
10 vastly outweighed by the harm that would result from the
11 exemption. The recording industry has been devastated by
12 piracy, which has and will increasingly have an adverse effect
13 on the industry and diminish the ability of the industry to
14 develop new artists and produce new creative works.

15 An exemption of the extraordinary breadth sought
16 by the proponents could forestall the development of technical
17 protection measures for music, and preclude use of technology
18 to fight piracy.

19 As the office has recognized, exemptions are to
20 be made only in exceptional cases. And we believe the
21 proponents here have failed to meet that burden.

22 There were a couple of things that were
23 mentioned additionally this morning that I'd like to respond
24 to. Just picking up with some of the comments of IP Justice
25 first.

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1 There is nothing, so far as we can tell, that
2 places a burden on the Librarian to seek out and favor
3 consumers in this proceeding. This proceeding was set up as a
4 fail-safe and the language from the manager's report and other
5 language specifically says that exemption should be found only
6 in extraordinary circumstances.

7 And therefore, the burdens that exist from the
8 last proceeding, you know, should exist, and we would say are
9 the right interpretation and are not a matter of favoring one
10 side over the other, but merely applying the letter of the
11 law.

12 I think the only other thing I would say on the
13 substantive comments that were raised with regard to copy
14 controls is again, that the statements about interference are
15 purely speculative at this point. There have only been nine
16 releases in the U.S. to date, to the extent that other
17 releases will be made in the future with some technical
18 protection measures, mainly copy controls, which again, are
19 not the subject of this proceeding.

20 It's simply theoretical, at this point, to say
21 that those copy controls somehow prevent access, even assuming
22 that that would be a proper jurisdiction for this proceeding.
23 There simply has been no showing that more likely than not,
24 that these types of non-infringement uses will exist.

25 I think I'll leave the rest of the comments for

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1 (i n d i s t i n g u i s h a b l e).

2 MS. PETERS: Okay, thank you. Mr. Belinsky?

3 MR. BELINSKY: Thank you. Good afternoon. My
4 name is Mark Belinsky and I'm the senior vice president of the
5 music technology division of Macrovision Corporation. I'd
6 like to thank you and the copyright office for the opportunity
7 to be here today, and I'd also like to express my appreciation
8 from Macrovision as a company, being able to provide input to
9 these rulemaking proceedings, both today as well as tomorrow
10 as well, where our president, Bill Krepick, will be present.

11 From our perspective as a supplier of copy
12 protection and digital rights management technology to the
13 content industries: that is; film entertainment, software,
14 and music for more than 20 years; we think that more than
15 anything else, these hearings and indeed, the DMCA itself, are
16 about creating and maintaining a balance between the interests
17 of content creators and the users or consumers of that
18 content.

19 This is admittedly not a lawyer's perspective,
20 but more of a practical perspective, having been an honest
21 middleman between content providers and consumers for more
22 than 20 years.

23 As we enter the 21st century, to us, it becomes
24 very clear that the economic vitality of the U.S., our
25 country, is heavily dependent on knowledge, information, and

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1 information technology industries.

2 According to a recent study that I think was
3 quoted in one of the comments submitted for these hearings,
4 the copyright industries alone in the U.S. generated \$535
5 billion of GDP and that excludes many other IP centric
6 industries.

7 And when you look at the percentage of our
8 citizenry that earns their living by creating, manufacturing,
9 or distributing knowledge and information products and
10 services, and also when you consider the investments required
11 to create and distribute that knowledge and information, you
12 can quickly come to the conclusion that the content creators'
13 ability to get paid for their creative works is not only
14 important but, indeed, fundamental to their very existence.
15 And by implication, we think fundamental to maintaining the
16 high standard of living that we currently enjoy here in the
17 U.S. as compared to many other countries.

18 Turning a bit more specifically to the topic of
19 music copy protection and DRM, I think it's by now common
20 knowledge, even to ordinary consumers, that recording artists
21 and the music industry are suffering greatly from unauthorized
22 reproduction and sharing of copyrighted music files.

23 I can't help but recall Johnny Cash's September
24 1997 testimony to the U.S. Congress when he and I both gave
25 testimony for the Commerce Committee's DMCA hearings, about

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1 how he was already personally experiencing this phenomenon,
2 and that was more than five years ago.

3 I also think it's quite interesting to note that
4 consumers today accept that when they buy "Shrek" or "Sweet
5 Home Alabama" on DVD, or when they buy Madden Football from
6 Electronic Arts, they don't have the ability to make copies
7 for their friends.

8 We believe that the same assumption should apply
9 to the latest music releases from Eminem, Avril Levine, or
10 Madonna. Whether you measure the music industry's problem
11 based on the overall declining music industry revenues, the
12 thousands of jobs lost at record companies earlier this year,
13 the bankruptcies of several music retailers, the decline in an
14 average top selling album from 20 million units to 10 million
15 units, or upon the number of music tracks available on file
16 sharing services, like Rockster and Morpheus, it's pretty
17 clear that the balance I described just a few moments ago has
18 shifted to the point where content creators are not able, at
19 least in the music industry, to reap the benefits of their
20 creative works.

21 In fact, in the court of public opinion, it
22 could be argued that many consumers believe copyrighted music
23 is free for the asking or free for the taking. And from our
24 perspective, this is precisely the kind of meltdown scenario
25 that justifies policy initiatives, where government

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1 establishes rules of engagement so an industry can continue to
2 provide valuable products and services to consumers, not to
3 mention provide employment to hundreds of thousands of people
4 in the process.

5 Juxtaposing the importance of the content
6 industries to the U.S. economy, with the growth and
7 development of the Internet as a distribution medium, we think
8 it becomes even more important to keep copyright laws strong,
9 and to take a narrow view and a very cautious view on granting
10 exemptions.

11 As has been pointed out in some of the
12 submissions leading up to this hearing, the music industry
13 has, over the past couple of years, begun deploying
14 technological prevention measures in connection with certain
15 of their sound recordings released on CD's, generally known as
16 copy-protected CD's.

17 The objective of these deployments, including
18 the CD's that are protected using Macrovision's technology,
19 has been to inhibit the unauthorized copying and file sharing
20 of music files, which has become almost commonplace over the
21 past several months, while at the same time maintaining
22 consumers' ability to listen to music on their CD players and
23 personal computers.

24 Up to this point, the general approach has been
25 to provide two versions of each music track on each CD, one of

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1 which plays on hi-fi's, car stereos, and other garden variety
2 CD players, and the other of which plays on personal
3 computers.

4 Within the past few weeks, just within the past
5 few weeks, Macrovision has announced a partnership with
6 Microsoft which will enable the music industry to configure
7 the second of these versions, the second session track, in
8 music industry terminology, to allow consumers not only to
9 listen to the music on their PC, but to rip the music to their
10 computer's hard disk several times, and then to burn CD's
11 and/or export the music to portable devices made by companies
12 like Sonic Blue, Creative Labs, Compaq, Thompson, and others.
13 Some of these very devices that one of the other folks just
14 described as you might use to go jogging. We expect to see
15 the first of these expanded capabilities CD's in the market in
16 the fall of this year.

17 Because of our long history providing
18 commercially viable transparent copy protection and DRM
19 technologies to content toners, we at Macrovision believe we
20 have a rather unique perspective on how technological
21 prevention measures can be used to create healthy ecosystems
22 that serve, over the long term, the legitimate interests of
23 creators and consumers alike.

24 In reflecting on the 20 years we've been in the
25 business, in particular supplying the film entertainment

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1 industry with copy protection, and the ten-plus years we've
2 been providing technological protection measures to the
3 software industry, we believe quite strongly that the music
4 industry is deploying technologies from Macrovision, but from
5 others as well, which will over time recreate the balance
6 between the interests of content creators and consumers.

7 In so doing, we believe that this will ensure
8 that great music continues to be available to consumers and
9 that great musicians and their marketing, distribution, and
10 delivery partners are rewarded for their creative works and/or
11 financial investments.

12 We also believe, in the context of these
13 rulemaking proceedings, that decisions about exemptions to the
14 prohibitions against circumvention should be made taking into
15 account the big picture and with a long-term perspective.

16 As is the case we think in domains outside
17 (indistinguishable) property and copyright protection, the
18 policy path of least resistance in the short term rarely
19 provides the best long term solution. And if we can agree
20 that we're ultimately talking in a small part maybe, about the
21 economic vitality of the whole U.S. economy, I think we can
22 and will see our way clear to making, or perhaps avoiding,
23 exemption decisions which ensure that the music industry can
24 thrive over the coming decades, however it morphs, to the
25 benefit of not only the industry, but the consumers as well.

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1 During the Q and A session, I look forward to
2 answering any questions you might have that I can address, and
3 thanks again for the opportunity to be a part of these
4 hearings.

5 MS. PETERS: Thank you. I'll start by asking
6 two questions and then passing it on. These are for EFF.
7 Just want to make sure that I -- what you're saying. Are you
8 saying that if, in fact, you buy a CD, and it doesn't play on
9 a particular device, then you are taking the position that
10 that is malfunction of an access control?

11 MS. HINZE: Actually, our position is a little
12 bit more nuanced. We're taking the position that this is
13 actually a (indistinguishable), it's an access issue. But we
14 have actually stated in our comments that we don't -- we have
15 taken the position that, in terms of the technical definition
16 of effectively controlling accesses --

17 MS. PETERS: You say it isn't?

18 MS. HINZE: Right. We do understand what that
19 definition says, and we're not taking the position that these
20 protection measures satisfy that definition.

21 But what we are saying is that the net effect,
22 from the point of view of a consumer, is that this is an
23 access issue. A consumer has purchased -- lawfully purchased
24 media, and is trying to play it and merely play it on a device
25 that has previously played this type of CD, and is making a

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1 non-infringement use of the work. We think that is an access
2 issue, first and foremost, not a copy control issue.

3 My second point is that there is some legal
4 uncertainty in the legal community about whether or not
5 something that controls incidentally, controls access, even if
6 its primary purpose was intended to be a copy control,
7 actually falls within the prohibition in 1201(a)(1). So to
8 the extent there's uncertainty, there's a chilling effect, and
9 the chilling effect is quite large on consumers.

10 Consumers are the people who have purchased the
11 CD's and who want to make a lawful, non-infringing use of
12 their works, but they're not sure because of the scope of --
13 they're not sure whether the scope of 1201(a)(1) will prevent
14 them from taking any measures to restore playability.

15 MS. PETERS: Let me just -- let me ask you, Ms.
16 Gross. Do you agree with what she just said?

17 MS. GROSS: Yes.

18 MS. PETERS: So that is your position too?

19 MS. GROSS: I'm sorry. I'm sorry. I was
20 writing something down. Could you please ask me what it is
21 I'm supposed to be agreeing or disagreeing with?

22 MS. PETERS: What I really was, which I didn't
23 pick up all the nuances, what I had said, which I've just been
24 told is not accurate, and I was checking out to see if you
25 agreed it was not accurate or you had a different position,

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1 was that when -- was it true that whenever someone bought a CD
2 that basically had a copy control on it but was put in a
3 certain playback device such that it wouldn't play, that that
4 was considered a malfunctioning access control?

5 MS. GROSS: I think it's even broader than that.
6 I think it's designed not to play in particular devices.
7 There was a report last September on CNN about a Celine Dion
8 CD that is designed to crash your computer if you try to play
9 it. So if you want to call that a malfunction, that's fine,
10 but I think it is designed to malfunction in that case.

11 MS. PETERS: But it was really whether or not it
12 was an access control.

13 MS. GROSS: It's absolutely an access control.
14 It is an access control that may double as a copy protection,
15 but it does both goals. It has both functions of denying
16 access and denying copying. So you could talk about it as
17 either one.

18 MS. PETERS: Now, let me go back to EFF. Based
19 on what you said, what extent does labeling -- Mr. Marks
20 basically pointed out that seven, seven Universal copy-
21 protected CD's that were limited with regard to where they
22 could be played. To what extent does the label respond to your
23 concern for consumers?

24 MS. HINZE: The first thing I'd like to say is
25 that if the experience that EFF has had in using or trying to

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1 use some of the label copy-protected CD's is anything to go
2 by, it is direct evidence. We have tried this on a number of
3 different systems.

4 The labeling isn't, in fact, accurate. It's
5 certainly -- for instance, if I take the example of the
6 Madonna CD here, it's a very small logo. I'd be happy to pass
7 this around for the copyright office panel to have a closer
8 look. But it doesn't actually indicate the presence of copy
9 protection. I It's a little logo. It doesn't actually say,
10 "copy-protected."

11 So, for instance, from the point of view of a
12 consumer who purchases one of these, unless you actually know
13 that that symbol means "copy-protected", you're going to be in
14 the position, as a consumer, of having bought this, and having
15 opened the packaging from Tower or wherever you've bought it,
16 and not knowing that that's a copy-protected CD. So I would
17 say that labeling is part of -- obviously part of the issue
18 here, but the effectiveness of the labeling and what the
19 labeling says is obviously an important point.

20 My second point on, I guess on a more
21 fundamental level, is that I actually don't think that, by
22 itself, labeling will address the nature of the harm that EFF
23 is attempting to cover by requesting the exemption we've
24 sought.

25 Even if something is labeled as copy-protected,

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1 and even if the labeling were accurate, which I think it
2 hasn't been to date, then there's still a situation where a
3 consumer cannot actually play something that they have
4 lawfully purchased. And --

5 MS. PETERS: But if the labeling were clear,
6 that it wouldn't work on their playback device?

7 MS. HINZE: I think then it might -- we'd have
8 to look at that a little more closely. I think that if that
9 were the case, I know as a specific statement about what
10 things that people can play it on, and what things they can't
11 play it on, then to the extent that consumers would not be put
12 on notice. That part of the harm would be dealt with.

13 I guess the other part of the harm in a more
14 metaphysical level that wouldn't be dealt with, is if there --
15 if there's no other format
16 for a consumer to access that particular work on.

17 MS. PETERS: I agree with that. Let's go back
18 to you, Mr. Marks, and labeling. Universal put out seven.
19 You said they were labels. They got less than one tenth of
20 one percent with regard to having any complaints or issues.
21 Is what's on that record what the label -- is that the label
22 that's used by Universal?

23 MR. MARKS: Well, I don't believe that's a U.S.
24 release.

25 MS. PETERS: Oh.

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1 MR. MARKS: Our understanding from Warner is
2 that the Madonna CD was not released in the U.S. with copy
3 protection. It's a foreign release.

4 MR. BUCHOLZ: It was purchased in the east
5 village of New York City.

6 MR. MARKS: Well, (indistinguishable) you know,
7 could have been imported.

8 MR. BUCHOLZ: Absolutely.

9 MR. MARKS: That doesn't mean it's a U.S.
10 release. So --

11 MS. PETERS: Well, maybe you could tell us.

12 MR. MARKS: I'm not familiar with that
13 particular label.

14 MS. PETERS: Well, but you could tell us, do you
15 know what the label is that's on the Universal releases?

16 MR. MARKS: I can try and see if I have the
17 Universal one. I think that different countries use different
18 labels.

19 MS. PETERS: You don't have to -- even that.
20 Just what's the general gist of what people say when --

21 MR. MARKS: Here is one that's a Universal
22 release that's pretty prominent. Let's see that. That's the
23 size of it.

24 MS. PETERS: Okay.

25 MR. MARKS: Okay? It says,

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1 "This CD is protected against unauthorized
2 copying. It is designed to play in standard audio CD players
3 and in computers running a Windows operating system. However,
4 playback problems may be experienced. If you experience
5 playback problems, return this disk for a refund."

6 And there's no standard for labeling.

7 MS. PETERS: But there are -- I mean, there are
8 two bills that are pending before Congress that would deal
9 with labeling.

10 MR. MARKS: Right. And I think the labeling is
11 not the issue here. I mean the issue here, again, is access
12 controls and --

13 MS. PETERS: I agree; I agree. My -- let me go
14 back over to this from (indistinguishable). Is your position
15 that a consumer basically has a right to buy a CD and play it
16 on any device?

17 MS. GROSS: Yes, that is my position, that if
18 they buy a CD, they do have a right to access that CD on
19 whatever device they choose. That is a different statement
20 from saying copyright holders must ensure access. That
21 copyright holders must make sure that they can provide for
22 entrap-ability.

23 MS. PETERS: Where do they get this right?

24 MS. GROSS: Because they have purchased it.

25 They own it. It is their property. It's pretty elementary.

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1 When you buy something, it is yours to do with as you wish as
2 long as you don't violate the other provisions of the
3 copyright.

4 MS. PETERS: But here, you're actually making a
5 copy. Right? In order --

6 MS. GROSS: What do you mean?

7 MS. PETERS: If you buy it in one format and it
8 doesn't play on what you want, in order to play it, don't you
9 have to make a copy?

10 MS. GROSS: I'm not sure that you would have to.
11 You would put it in your homemade CD player and I don't know
12 that it would make a copy. It might just play it.

13 MS. PETERS: (Indistinguishable) where you
14 thought the consumer had a right to do anything to make it
15 play?

16 MS. GROSS: I assume --

17 MS. PETERS: Like with regard to videos, if it's
18 in a PAL format or CCAM format, you really do have to make
19 another copy. But maybe over here they don't. Right.

20 MS. GROSS: But even if they did make -- even if
21 they did have to make that copy in order to make that, in
22 order to play it, they're still within their rights. I mean
23 we have a right to make a personal use copy of something if we
24 need to in order to access that material.

25 MS. PETERS: Where does this come from?

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1 MS. GROSS: Fair use. Personal use.

2 MS. PETERS: Great. So that's your

3 interpretation?

4 MS. GROSS: That is my interpretation,

5 absolutely.

6 MS. PETERS: Yes?

7 MS. HINZE: I'd like to just make a comment if I

8 may.

9 MS. PETERS: Sure.

10 MS. HINZE: Two things. One, I'd like to answer

11 one particular way that you might be able to, for instance,

12 restore the playability of one of these CD's. In EFF's

13 comments, in our detailed comments we submitted in December,

14 we attached a paper by, as I said, Princeton researcher John

15 Alexander Halderman. That's a quite a technical paper from a

16 computer scientist, and he actually has conducted a series of

17 tests on three different types of copy-protected CD's.

18 He talks about two mechanisms that might be used

19 in order -- he actually did some of this work as part of the

20 task of researching on what particular drives and what

21 particular operating systems, Windows 95 or Windows 98 Windows

22 2000 --

23 MS. PETERS: Um-hmm.

24 MS. GROSS: -- and what particular CD ROM drive

25 things would fail. In order to make some of the multi-section

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1 disks actually function, he did some testing with two -- with
2 one particular type of mechanism. He put masking tape, as I
3 understand it, to cover the second section on the disk so that
4 the CD player was able to read the table of contents on the
5 second section and play the material.

6 Again, the paper is actually quite informative
7 about the nature of this technology such that information was
8 available. And what one of the things that comes out of the
9 paper is that how copy protection works on any given CD player
10 or any playback device is specific to each particular playback
11 device.

12 So, in response to earlier question about
13 labeling, I guess I would like to point out that it would be
14 extremely difficult, based on my understanding of what is in
15 that paper from a technical point of view, to actually be able
16 to specify on what devices something will not play.

17 So while you say this -- this instance, this is
18 instructive, but Madonna's CD includes a statement that this
19 will actually play on MAC O/S, MAC operating system, and on
20 Windows players. The reason it was discovered to be copy-
21 protected was because it didn't play on the MAC player.

22 So to the extent that labeling may go some of
23 the way to addressing consumer awareness of the particular
24 issue, there are technical limits, set limitations about what
25 a label can actually say to put consumers fully on notice of

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1 the harm that they are about to experience.

2 MS. PETERS: Okay. I actually went to labeling
3 because one of the comments suggested narrowing the category,
4 if in fact, it would not be -- you couldn't circumvent, if, in
5 fact, there was a clear statement with regard to what it would
6 and wouldn't play on. That's what I based it. I apologize.
7 I will read this. It was not attached to my copy.

8 MS. HINZE: The other thing I'd like to do is
9 point out in terms of another popular way of, as I understand
10 it, that people have been restoring the playability of these
11 disks where they don't play, is by using a felt tip marker. A
12 felt tip marker and masking tape --

13 MS. PETERS: Yes, yes. They work well.

14 MS. HINZE: Apparently, they work quite well and
15 they wouldn't, of course, violate the --

16 MR. BUCHOLZ: The tools provision.

17 MS. HINZE: The tools provision in 1201(a)(2).

18 So there are ways available to consumers to restore
19 playability such that circumvention would not necessarily --
20 such that consumers could do that without violating one of the
21 other provisions in the DMCA.

22 MS. GROSS: Could I just follow up quickly, also
23 with another indication that consumers have a right to listen
24 to the CD that they purchased, which is very clear in the
25 copyright act that the control over the performance by the

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1 copyright holders is with respect to the public performance.

2 The private performance, when I'm at home, and I
3 want to play it on whatever device that I choose, that is
4 explicitly outside of their control. It is not a public
5 performance. It is a private performance. It is reserved for
6 the individual.

7 MS. PETERS: Yes.

8 MR. MARKS: Could I make a few comments?

9 MS. PETERS: Yes.

10 MR. MARKS: Picking up with the last one, I
11 think there's a fundamental difference between what is
12 actionable as an infringement and what is a right of the
13 consumer. And as our comments that we filed cited several
14 legal opinions, saying clearly that the law is not that there
15 is a right of a consumer to play on whatever device they want.
16 I can't buy a CD, for example, and put it into a cassette
17 player. I mean, that's akin --

18 It's really the same issue. I think that -- you
19 know, that one thing that is dangerous, and I think also
20 inappropriate, is to talk generally about copy protection as
21 though it is all the same.

22 It is not. There are different technologies.
23 There's been different technologies that have been used to
24 date, there are going to be different technologies that will
25 be used in the future. And that, I think, is one of the

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1 infirmities of the proposal on, from the EFF, and IP Justice,
2 is that there -- it does not specify any particular technology
3 that is an access control.

4 Even setting aside the, "it's a copy control,
5 not an access control," even assuming we could get by that
6 issue, it just broadly sedates all CD copy control, and that
7 is what is so potentially harmful going forward of the
8 exemption, because far from the chilling effect that was cited
9 by EFF and IP Justice, the chilling effect will indeed be on
10 the ability of record labels and technology companies to
11 provide for what they deem to be appropriate and workable copy
12 protection in the future, so that they can make available, you
13 know, works on a going forward basis and, you know, fulfill
14 the intent of Congress passing DMCA to continue to make music
15 available.

16 MS. PETERS: Okay. Thank you.

17 MR. CARSON: Mr. Marks, let's go back to the
18 first comment you made about there being no consumer right to
19 play a CD, for example, on any device they want to. Let's
20 look at it another way.

21 Let's say there is a CD that has an access
22 control on it that prevents you from playing it on a personal
23 computer, just for example. Let's say Ms. Gross takes it and
24 try to figures out how to make it play on her personal
25 computer, even though the intent of the copyright owner was

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1 that it shouldn't play on that personal computer. When she
2 does that, is she engaging in an act of infringement?

3 MR. MARKS: I think it is a -- she's
4 circumventing under 1201(a). MR. CARSON: Okay.
5 Yeah, I think that's probably true but that wasn't the
6 question. Is she engaging in an act of infringement?

7 MR. MARKS: Is she engaging in an act of
8 infringement by accessing? I think that the -- I think it's a
9 1201 issue, and probably not an infringement issue.

10 MR. CARSON: She's making a non-infringing use
11 of the work itself?

12 MR. MARKS: Right.

13 MR. CARSON: Okay.

14 MR. MARKS: Because it's an access, not a copy
15 or a distribution or something.

16 MR. CARSON: Right. So in that case, the
17 technological measure that restricts her access to the work,
18 is in fact adversely affecting her ability to make a non-
19 infringing use of the work, is that correct?

20 MR. MARKS: It may -- I don't know whether it's
21 an adverse impact.

22 MR. CARSON: She can't do it. she can't make the
23 non-infringing use.

24 MR. MARKS: She may be able to make a non-
25 infringing use by getting the music in another form.

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1 MR. CARSON: But with respect to the particular
2 non-infringing use she is trying to make, what your accepting
3 is a non-infringing use, she has been adversely affected in
4 her ability to do that by virtue of the prohibition on
5 circumvention.

6 MR. MARKS: I'm just -- I'm not sure -- I don't
7 think that that's the test.

8 MR. CARSON: Maybe it isn't. I'm just asking the
9 question and we'll figure what it means later on. I just want
10 to know.

11 MR. MARKS: You know, I'm -- it's a
12 hypothetical, I'm not sure, as I just haven't thought about it
13 in those terms because I don't think that's the test that
14 governs out (indistinguishable).

15 MR. CARSON: Okay, we'll think about it and you
16 can get back to us on that one. You know, one thing I'm not
17 entirely clear on. Is it your testimony that in some cases
18 record companies are, in fact, marketing CD's with the intent
19 that those CD's cannot be played on certain kinds of devices
20 that consumers do use to play CD's on?

21 MR. MARKS: I'm sorry, could you just repeat?

22 MR. CARSON: Yeah. Is it your understanding that
23 record companies at the moment, are, in fact, marketing some
24 CD's with the intent that those CD's cannot be played on
25 certain devices that consumers do use to play CD's?

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1 MR. MARKS: Not my understanding. They -- I
2 think that from the label, for example, that I just read, it
3 said it may not play. I don't know whether that's the
4 equivalent of an intent that it not play. I do think that, in
5 the future, there may be so-called hybrid disks that have
6 different sessions. One session is playable on one type of
7 device, and another session is playable on another type of
8 device.

9 MR. CARSON: Is it that you truly don't know
10 whether that's the intent, or is it that, in fact, it's not
11 the intent, but it may be an unintended side effect. Do you
12 know the answer to that, or is it just you don't know?

13 MR. MARKS: That what's the unintended side
14 effect?

15 MR. CARSON: That it can't play on certain
16 devices.

17 MR. MARKS: It -- well, you know, again, it's --
18 I'm not sure unintended side effect as a result of a problem
19 with the well that's being used is a problem with the machine
20 that's being used, not necessarily a problem with the copy
21 control. Again, this is copy control, not access control, but
22 --

23 MR. CARSON: Um-hmm.

24 MR. MARKS: -- but what EFF and IP Justice have
25 done is just presume that there was a malfunction of the copy

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1 control, even setting aside the copy control access control
2 issue. Yet there isn't any proof that that's the case, that
3 there is a malfunction. And that's what makes this very
4 different from the dongle exemption last time around. I mean
5 not only was that specifically an access control, but it was
6 specifically a malfunction.

7 Here, there's no evidence at all that it's a
8 malfunction. It may just be of that technical
9 protection measure. It may just be a technical
10 incompatibility between, you know, the well in that
11 machine, or the operating system on that machine and
12 the disk.

13 MR. CARSON: Okay. So I gather you can't say
14 whether any record companies are actually marketing CD's that
15 they intend not be played on certain devices. You just don't
16 know the answer to that?

17 MR. MARKS: I don't know the answer to that
18 right now.

19 MR. CARSON: Okay. And that (indistinguishable)
20 the information you can get back to us?

21 MR. MARKS: Yeah.

22 MR. CARSON: Okay, I think I've got my two
23 questions, at least some of (indistinguishable).

24 MS. HINZE: Might I just --

25 MS. PETERS: Did you want --

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1 MR. CARSON: Oh, I'm sorry, someone wanted to
2 respond to that, yeah.

3 MS. HINZE: I wouldn't mind responding to that
4 now before we go onto other areas.

5 MS. PETERS: Yeah. Sure.

6 MS. HINZE: What I've just heard
7 is a statement that seems a little inconsistent. On the one
8 hand, I've heard that a problem with playback -- I've heard a
9 disconnect between intent and malfunction, and what I would
10 like to say is it seems to us, as untrained technologists and
11 you're paying all the trained technologists who wrote the
12 paper that I have cited in our comments, that these
13 malfunctions were unintended.

14 And in any event, they are malfunctions purely
15 because what is happening at the time when a disk is not
16 playing, in many cases, for instance, in the case of a multi-
17 section CD what is happening is that there are two formats of
18 content on a disk. One is a protective format, and one's an
19 unprotected format. And the error, if you were to put it in
20 those terms, that the user, consumer experiences when
21 something doesn't play is a substitution error.

22 There has been a problem with substituting
23 cleanly the material that was intended to be -- apparently
24 intended to be substituted in place of the unprotected
25 material. That looks like a malfunction. I can't think of

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1 any other reason why.

2 For instance, it would be the case that you
3 would see a disk that plays on one type of device, meaning a
4 Windows 2000 machine, and similar type of computer running a
5 Windows 98 operating system, would experience a malfunction.
6 To the extent that there's that much variation between the
7 nature of the errors that have been experienced on a drive by
8 drive basis, and an operating by system by operating system
9 basis. It -- common sense would seem to dictate that it is
10 not the intent of the copyright owner, in that particular
11 situation, to prevent the music from playing in some format.
12 And what is happening is a malfunction of the technology.

13 Now I'm not technologically enough aware to know
14 particularly where in the chain of playback or table of
15 contents areas or just whether it's an area being introduced
16 into the sub-channel data with -- channel pay sub-data. I
17 think that's -- that little detail is something that the
18 copyright office might be able to glean from reading the
19 papers that I've referenced.

20 And I would also draw the copyright office's
21 attention to the table that's annexed to that, which gives a
22 listing of the types of particular drives and the particular
23 operating systems that the tests were done on. And it becomes
24 apparent when you look at that, the unintended nature of the
25 malfunctioning, and the reason that's malfunctioning because

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1 it's a very inconsistent pattern of non-display of material or
2 non-playback of material.

3 MR. MARKS: I think my point was just that the
4 malfunction -- you can't make the leap that it is the
5 technology that is malfunctioning, that the technical
6 protection measure that is malfunctioning. It could be due to
7 an incompatibility. And you know, so that was really just my
8 point.

9 You know, the question is whether is there a
10 malfunction in the TPM? Not clear that there is. There is no
11 evidence that there is. It may be. It may be functioning
12 entirely properly as an entire different reason that there is
13 playback difficulty. I mean this is one of the -- this also
14 gets back to the point of, you know, the danger of talking
15 generally when there are different technologies out there.
16 Some of the technologies that may have been addressed in an
17 article may no longer be used. They may have been used on one
18 disk. Out of 125,000 that were released, there were only
19 nine. It may have been used one time on one of those nine
20 disks and may never be used again.

21 Clearly, you know, that nine out of 125,000 or
22 that use of that one technology, you know, can't rise to the
23 level of an exemption under the, you know, in this proceeding.
24 And in terms of the future, it's speculative as to what
25 technologies will be used and how those technologies actually

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1 work. And therefore, there's simply no way for the burden of
2 it's more likely than not for an adverse impact to result.
3 There's just simply no way for that to be met.

4 MS. HINZE: I'd also be happy to address that
5 now but I appreciate that this is the prerogative for the
6 copyright office to direct questions.

7 MR. CARSON: We've got time here.

8 MS. PETERS: We've got time, yes.

9 MS. HINZE: I've heard so far that -- proof that
10 sounds to me like we have a clear statement of agreement on
11 the grounds that there are copy-protected CD's that are
12 currently in existence in the United States. The first time,
13 I might add, I've now heard that there are, in fact, nine
14 titles that have been released in the United States so I'm
15 happy to have some quantification at long last. I think the
16 relevant point from a point of view of assessing the nature of
17 the harm here is twofold.

18 First, it's not just the fact that there are
19 nine titles that have copy protection, it's the number of the
20 titles, the number of units of those titles that are in
21 distribution that would give a better sense of the qualitative
22 -- I'm sorry -- the quantitative harm that may be experienced
23 by consumers.

24 I'd also like to point out that to the extent
25 that there are copy-protected CD's in the United States that

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1 are not U.S. releases, whatever that means, such as the Donner
2 CD. And I've also got a CD that I, myself, came across that
3 has copy protection on it. Yes, it's labeled, but it doesn't
4 play, and it's not a Universal release to the extent that
5 there are a number of other non-U.S. released copy-protected
6 CD's out there.

7 I would hesitate to limit myself to believing
8 that the only number of copy-protected CD's in the United
9 States are "X" number of units times nine titles. If my
10 experience is anything to go by, and I think it's direct,
11 firsthand experience, the number of copy-protected CD's
12 currently in the United States is actually larger than I think
13 we're getting a glimpse of this afternoon.

14 The second thing I'd like to point out in terms
15 of an assessment of harm is the nature of the harm for the
16 consumer. The consumer has lawfully acquired this particular
17 packaging, and this particular plastic device, and has an
18 enormity of expectation that they're going to be able to play
19 something that they have played on a CD player, their car, MP3
20 CD player before, that they previously played it on a DVD
21 player, none of which have any capability for reproducing. So
22 there's no sense in which the consumer is -- the case varies -
23 - if she was intending to get a benefit by trying to make a
24 copy. All they're attempting to do, when they're trying to
25 play this type of material, is play it. And they have a good

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1 (indistinguishable) expectation for expecting that this will
2 actually play in their devices.

3 What we're asking for is a limited exemption for
4 a playback, and it's quite an appropriate thing for consumers
5 to expect that they will be able to play this type of plastic
6 disk, whether it's a CD in a (indistinguishable) format or
7 not, for the purposes of audio standards. They had a
8 reasonable expectation that they ought be able to play it
9 based on their 20 years of using CD's.

10 It's not the case where a consumer is putting a
11 CD into any toaster or a cassette player. The actual real
12 situation is someone putting something into a device where
13 they can reasonably expect that there will be playback.

14 MR. MARKS: I have a couple of quick ones. On
15 the quantitative issue, you know, the only thing that I can
16 give you quantitatively was what Universal told us about some
17 of the nine releases, and that was less than one tenth of one
18 percent in complaints, so I would say that there really is no
19 quantitative evidence.

20 And the evidence that was presented in terms of
21 all these other disks above the nine, you know, again, there
22 were 45 that were referenced in the replies, and only three of
23 the 45 had any kind of technical protection measure. And then
24 finally, just to get back to the very first point, which I
25 think is still the most important point, and that is these are

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1 copy controls, not access controls and therefore, outside the
2 scope of this proceeding.

3 MR. CARSON: Isn't it good enough for you? He's
4 saying the copy control, not access control.

5 MS. HINZE: Well --

6 MR. CARSON: Does he have to say anything more.

7 MR. MARKS: No, what I'm saying is that the
8 allegation is --

9 MS. GROSS: (Indistinguishable) for trying to
10 access it, so that sounds like an access control issue.

11 MR. MARKS: The technical -- no, you just -- I
12 thought before, in response to the question, -- I've got it in
13 my notes -- it's an access issue. We would agree it's not a
14 access technical protection measure. I'm not here to say that
15 any particular technology is a copy control versus something
16 else. All I'm saying is that the proponents have said
17 themselves that they're copy controls, and that's --

18 MS. GROSS: In addition to being access control.
19 We're saying they're both.

20 MS. HINZE: I think there is actually a
21 difference.

22 MS. PETERS: There's a difference of opinion;
23 right.

24 MR. CARSON: There is a difference, right. It
25 means different things to different people.

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1 MS. HINZE: But I guess I would like to ask if
2 the RIAA would be prepared to make a statement to the effect
3 that these, for all intents and purposes, will be considered
4 copy protection, access measures are only copy protection
5 technological protection measures, and if we perhaps were to
6 get a statement from the RIAA, if they would be happy to let
7 us know that they won't take legal action against the
8 consumers for a violation of 1201(a)(1).

9 Then, you know, I think as I said in my opening
10 statement and if that was made clear in it's submission, we
11 would be prepared to be happy to go home at that point.

12 The point -- from the consumer point of view is
13 that it's not so clear cut. And to the extent there's a
14 chilling effect on consumers, what are consumers supposed to
15 do? They've bought a CD, they're not sure what they can do
16 with it. They've (indistinguishable) but they can't play it.
17 Are they breaking 1201(a)(1)(indistinguishable)?

18 MR. MARKS: I'm sure they could play it in their
19 audio CD player. There's no question about that.

20 MS. HINZE: And what about --

21 MR. MARKS: As much as I would love to give you
22 that assurance, I just can't. And the reason for that is that
23 we don't -- you know, we're not here to evaluate certain
24 technologies, and most certain technologies is, you know, is
25 addressed as part of the exemptions.

1 MS. PETERS: She's just leaped on) the fact that
2 you said copy.

3 MR. CARSON: (Indistinguishable) go
4 ahead.

5 MR. BELINSKY: Yeah, thanks. I'd just like to
6 add something on the general notion of formats. And that is
7 that I think we're starting to enter a period where there will
8 be -- forget copy protection and access controls just for a
9 second.

10 There will be multiple formats that physically
11 look exactly like the CD that you saw over there. There's
12 already the super audio CD, there's the DVD audio, there's
13 going to be DVD 9, there's DVD blue laser. In the electronic
14 world, there's the WMA format from Microsoft, there's MP3,
15 Apple's new service uses AAC.

16 And I think that, juxtaposed with the broader
17 availability and broader capabilities for consumers to get
18 access to copyrighted works, I think over the next -- from
19 where we sit, technologists perspective -- over the next three
20 to five years, there will be a multiplicity of data and
21 content formats that will, just as more content is coming
22 available, it will, I think, render the notion that any
23 physical item that is five inches in diameter can be plugged
24 into any particular player.

25 That notion is not going hold true for the next

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1 three to five years, I think. And that, to me, is just what
2 you see when you go into a period of rapid technological
3 innovation, is you have a format differences and file size
4 differences, etcetera, and then eventually things shake out
5 again in the next period of stability, like we've just been
6 through a period of stability in the CD format, let's say, for
7 the last 15 years, where a CD is a CD is a CD. Now things are
8 starting to morph again, and that is ultimately to consumers'
9 benefit, but there's some thrashing that goes along, goes
10 around in the interim period.

11 MR. CARSON: Let's pause here on that then. Are
12 you talking purely about an abundance of new and different,
13 and sometimes incompatible formats?

14 MR. BELINSKY: Yes.

15 MR. CARSON: Or in connection with that, will
16 there sometimes be technological protection measures to allow
17 some of those that will prevent something that is a new
18 format, for example, from being accessed on the standard CD
19 player?

20 MR. BELINSKY: My comment was solely related to
21 the fact that new formats are going to proliferate.

22 MR. CARSON: So you're not -- you're not
23 foreseeing that on top of that, there will be any kind of
24 access controls that make it impossible or difficult to play
25 the new format on an old player?

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1 MR. BELINSKY: Not necessarily, no. I mean, from
2 where we sit, we don't make those decisions. So you know,
3 it's --

4 MR. CARSON: You're not part of the process
5 (indistinguishable).

6 MR. BELINSKY: (Indistinguishable) decides,
7 what business rules, policies, etcetera.

8 MR. MARKS: And I would just go back to one of
9 the first statements I made, which is that record companies
10 want to sell music and they don't want to lock up their
11 content, they want to provide access. Otherwise, they don't
12 have a business because there are certain consumer
13 expectations and you want to sell something that the
14 consumer's going to be happy with.

15 MS. PETERS: Okay, what about Steve?

16 MR. TEPP: Thank you. Mr. Belinsky, you
17 mentioned in your opening statement, the second session, and
18 we've had a little discussion of that previous panel
19 discussing related issues back in Washington. I'm still a
20 little confused as to what functionality the second section
21 gives consumers. So, can you help me out by telling me what
22 can a consumer do with the second section that they can't do
23 with the first section?

24 MR. BELINSKY: Okay. The second section is in a
25 format and has extra information as part of it that

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1 essentially allows the consumer to play the music on a PC. So
2 when you put a CD into a personal computer and you listen to
3 the music, you're listening to the music from the quote,
4 unquote, second section files.

5 MR. TEPP: Yeah.

6 MR. BELINSKY: So it's, it's what gives a copy-
7 protected CD the ability to play music on a personal computer.
8 It's just that it's another aspect of the overall technology
9 used to produce a copy-protected CD that inhibits copying and
10 file sharing and by the same token, allows the consumer to
11 listen to the music on personal computers as compared to
12 garden variety CD players, like stereo systems, boom boxes,
13 you know, CD Walkman's, that sort of thing.

14 MR. TEPP: Thank you. So let me jump back to
15 this side and say, do you -- Mr. Belinsky says even when the
16 first section is protected, you've got the second section, you
17 can play on your PC. Does that solve your problem or do you
18 have some disagreement with the way he's described the
19 reality?

20 MS. HINZE: What I understand is actually
21 happening when people are experiencing playback errors is that
22 substitution is not actually taking place.

23 So for whatever reason, whether you call it a
24 technical incompatibility or a malfunctioning and copy
25 protection, technological protection measure -- I'll leave

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1 that issue to one side -- the point is that that substitution
2 is not actually happening.

3 That may have been the intent on the designers
4 to copy protection technology, but where it doesn't playback,
5 what is happening is that for whatever reason, consumers are
6 not actually getting access to that second section. And the
7 exemption that EFF has sought would allow consumers to do
8 that, whether it be by -- for instance, I don't want to
9 speculate as to what consumers might be able to do -- but for
10 instance, consumers might be able to do exactly that and get
11 access to the second section where the particular copy
12 protection technology fails on their particular consumer
13 playback device by, for instance, using a felt tip marker or
14 some other way of restoring the playability.

15 MR. MARKS: Mr. Tepp?

16 MR. TEPP: Please.

17 MR. MARKS: The thing that may help clear up the
18 confusion on this is that, I think what Mr. Belinsky is
19 talking about in terms of disks that may have two sections may
20 not be the same thing as David holding up those audio disks
21 that may only have one section on them. So they're two
22 different products, potentially, that I think is causing some
23 of the confusion.

24 MR. TEPP: Okay. All right. Thank you both.

25 That does clear it up for me. MS. HINZE: Just to

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1 clarify, my comments were respective of a multi-section disk,
2 and when I -- as I said, that consumers may be able to access
3 to first section on that disk, the one that they would not --
4 otherwise not be able to see for reasons of malfunction. I
5 was actually specifically addressing, as I understand it, the
6 type of Macrovision copy protection technology that involves
7 multi-section format, apparently CD's.

8 MR. TEPP: Okay, thank you. So let me come back
9 to this side for a minute, and it sounds like, from the
10 description you've given at least with regard to the dual
11 section disks that there is an intent to let consumers play
12 the music on any device they choose.

13 MR. BELINSKY: Absolutely.

14 MR. TEPP: Within reason, not toasters. If
15 that's the case, what harm would there be in letting them deal
16 with some sort of technical issues that arise
17 (indistinguishable) those qualified as 1201(a)(1) violations
18 we can't seem to get agreement on today, but what harm arises
19 to your industry if there's an exemption that makes it clear
20 they're allowed to do what it sounds like you were willing to
21 let them do in the first place?

22 MR. BELINSKY: I think, from our perspective,
23 looking across multiple content industries and being a
24 technology supplier, it opens up the door for folks to do that
25 on a large scale and then content becomes available on the

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1 Internet at no charge. And it has the long term result of
2 damaging, if not decimating, not only the music industry, but
3 the movie industry, the software industry, the pharmaceuticals
4 industry.

5 If an ecosystem can't be created, and I think to
6 create it requires some assistance, particularly in today's
7 technological age, from government, then you could end up
8 doing substantial damage to every creator's ability to profit
9 from their creation and then the investment cycle falls apart
10 and you don't get nearly as good a music video, prescription
11 drugs, semi-conductors, as you're currently getting today, or
12 you attenuate the progression of those developments. That's
13 what's -- that would be our perspective.

14 MR. MARKS: I think the harm is also that what
15 we're talking about and the nature of the question by itself
16 is something hypothetical, something in the future, something
17 that's speculative. There's been no evidence presented that
18 there's been anything more than the diminimus problems with
19 certain technologies, and the proposed exemption is for
20 something much broader that would encompass all technologies
21 that have so-called copy protection, technical protection
22 measures.

23 And I think the harm to the industry is that by
24 doing that, you are stifling the ability potentially to use
25 appropriate technical protection measures, technical

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1 protection measures that Congress, you know, envisioned, and
2 encouraged, as result of the DMCA. Because it's -- we're not
3 talking about a -- you know, any specific technology here that
4 is actually causing harm, it just doesn't exist in this
5 record, and therefore, you know, having an exemption that
6 covered all potential technologies is problematic and harmful,
7 and that would interfere with the ability to actually
8 institute certain types of technical protection measures
9 because we don't know today how they will work.

10 MR. TEPP: Okay, did you have one last question?

11 I'm sorry, go ahead.

12 MS. HINZE: I thought it might be appropriate to
13 respond while we're on this topic. I wanted to make two
14 points.

15 First, the first one is to address the statement
16 that we've sought a really broad exemption, and that it would
17 cover a whole range of technologies. Actually, our exemption
18 is quite narrow, in that I want to point out a couple of
19 features.

20 Our exemption only covers copy-protected CD's
21 that malfunction and prevent access. To the extent that they
22 work and they work now, or in the future, whatever the
23 technologies are, then they would not be caught by the scope
24 of our exemption. Our exemption, as I said, will only catch
25 things that are malfunctioning. So I would actually

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1 characterize it as a narrow, not a broad exemption.

2 Secondly, incidentally point out that the
3 statement that we have not provided any information about the
4 technologies at issue is perhaps a little bit of a
5 mischaracterization of the comments that EFF filed in
6 December.

7 EFF listed the four types of copy protection
8 that we are aware about from publicly available information
9 that it's currently being used, Macrovision made available to
10 that timeless or separate entity, SunnComm and TTR. We've
11 also mentioned Sony's K2 audio system. We have made best
12 endeavors to obtain information about each of those
13 technologies. (Indistinguishable) in the case of with
14 Macrovision, SunnComm's media clock, and as I said, the Sony
15 K2 audio system.

16 There is very little available information about
17 that, as I'm sure Mr. Belinsky could point out, a number of
18 these technologies are subject to trade secret protection, and
19 it is difficult, from a consumer point of view, to actually
20 get a clear statement about how the technologies work on any
21 technical data that might be available. Consumers have to
22 rely on testing along the lines of that done by Mr. Halderman
23 in the paper I've referenced.

24 Finally, I'd just like to make one point when
25 we're on the topic, since it's received so much comment so

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1 far. And that is this: The particular copy protection
2 measures that are being used at the moment are, if we are to
3 take the words of the record executives and the technology
4 companies, they are designed to keep honest people honest.
5 They are designed to stop casual copying. They have no impact
6 as far as anyone can tell on large scale commercial copying.

7 so to the extent that one person was able to
8 obtain the content on one copy-protected CD and put it on a
9 PIP Network, for instance, this exemption will have no impact
10 on that. That is already currently happening, and the fact
11 that consumers might have the ability to restore playability
12 to, on disks they currently have purchased which don't have
13 playability, that is a completely separate scenario for what
14 is currently happening and the impact that it would likely
15 have on the existing world of PIP technology and networks.

16 MS. PETERS: Could I note that this side of the
17 table is wanting to say something or is it just facial
18 expression?

19 MR. MARKS: Well, I -- I'm just not sure what
20 malfunction means in this context. I mean, you know, again,
21 the scope of this proceeding is access controls that, you
22 know, have a substantial impact on what are different uses.

23 And you know, notwithstanding the assertion of
24 IP Justice, it certainly sounds and reads, when you read the
25 documents, like what they are talking about are copy controls,

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1 not access controls. And again, there's no evidence that's
2 been presented at all that even those are malfunctioning.

3 So it's just a very different situation even if
4 you could get over that first hurdle, then the dongle
5 exemption from last time.

6 MS. PETERS: I think we understand your
7 different positions.

8 MR. TEPP: Well, let me just sort of pick up a
9 point Ms. Hinze just made and ask you to respond if you care
10 to, and that's my last question.

11 Has there been any correlation between the level
12 of piracy of unprotected CD's and protected CD's? Because Mr.
13 Belinsky made the argument that lay people use an exemption
14 for this purpose is going to facilitate pier to pier, or
15 piracy re-appear. Pier networks and all sorts of problems,
16 Ms. Hinze says, "No, actually that's not the case." We have
17 some basis for historical analysis. Do you have any
18 information?

19 MR. BELINSKY: Only from the video industry and
20 the reason only from the video industry is we've done tri-
21 annual consumer copying studies for the last 15 years on a
22 nationwide basis, across the U.S., 1008 households generalize
23 (indistinguishable) the U.S. population in general, etcetera,
24 statistically.

25 And what we've found over the last 15 years,

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1 given that copy protection appeared at the dawn of the VHS
2 format, in about 1985, is that each successive study showed
3 lower and lower consumer copying attempts and lower and lower
4 rates of piracy. And/or -- yeah, piracy and unauthorized
5 sharing of video.

6 And what we attribute that to is kind of a
7 conditioning effect over a number of years on the part of
8 consumers that it isn't okay to buy one copy of The Lion King
9 at Blockbuster video and make 14 copies for your neighbors.
10 In the music industry, it's just way too soon to tell. Copy
11 protection in any scale has only been with us probably for the
12 past year to maybe 18 months.

13 And the vast majority of music CD's still are
14 not copy-protected, despite our success in achieving 100
15 million CD's, the total annual production of music CD's is way
16 north of a billion, almost two billion on a worldwide basis.

17 So, unfortunately, there isn't the data set to
18 really have any data that would suggest what's happening right
19 now. The only data we have is that if you do take the long
20 view, over time, you end up with a balance between consumers
21 getting great content at great prices, and creators being paid
22 for their investment in their creative works, so
23 unfortunately, nothing to report on the music industry in
24 particular right now.

25 MR. MARKS: I would agree with that. I

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1 think that -- I certainly am not aware of any information. I
2 think it's precisely because you really only have nine disks
3 that have been in the market for you know, a certain period of
4 time. It's very hard to draw any conclusions. I haven't
5 heard any specific data or any conclusions from there. The
6 100 million that Mr. Belinsky was referencing is a worldwide,
7 not a U.S. number you know, in terms of music.

8 MR. BELINSKY: That's virtually all outside of
9 the U.S.

10 MR. MARKS: Yeah, that sounds right.

11 MR. BELINSKY: And up to this point.

12 MR. TEPP: Okay, thank you.

13 MS. DOUGLASS: Ms. Hinze, it seems like you've
14 been talking about a number of frustrations and I need to
15 (indistinguishable) when people put their CD's into the CD
16 player and it doesn't work. I'm trying to get to the adverse
17 effect -- not necessarily substantial adverse effect, I'm
18 trying to get to adverse effect, you know.

19 From what I hear, is there are only nine titles,
20 like in number of multiplied by however many there are, of, in
21 the industry, of that nine titles. But it seems like everyone
22 wants to see, hear a little bit more in terms of adverse
23 effect.

24 For example, your reply number 59 says that, "He
25 had problems" -- "a problem trying to play his CD in a

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1 particular" -- maybe it was a PC. It was a PC, and he said,
2 "Well, it took me a lot of time, but I eventually downloaded a
3 program and indeed I was able to play it."

4 So that concept in my mind at first effect
5 (indistinguishable) or are we saying this is just an
6 inconvenience? It took him a long time, but he did finally
7 get it. So, you know, you gave four titles that had some
8 problems but I'm not too sure if it adds up to adverse effect
9 in my mind.

10 MS. HINZE: So what I understand you to be
11 asking is, a statement about what the harm is, and whether it
12 may or may not rise to a substantial adverse?

13 MS. DOUGLASS: Yes, yes.

14 MS. HINZE: Right. I think there are various
15 aspects of that question. I think there is some genuine
16 disagreement amongst maybe this side of the room and that side
17 of the room about the number of copy-protected CD's that
18 currently exist in the United States, whether they be U.S.
19 releases or otherwise, so I think that EFF's position would be
20 that there are a number of copy-protected CD's in the United
21 States. Statement one; that's the current position.

22 Statement two; in the future, there will be --
23 if we can go by the indications of the record industry
24 (indistinguishable) statements and by technology company
25 statements, there will be, as early as this year, on Arista

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1 and BMG releases, there will be copy protection. Then the
2 question is, is it likely to malfunction?

3 Well, that's an interesting question. It seems
4 to be that there are -- you are looking at reply comments that
5 have been filed by consumers in, 48 consumers in this
6 particular proceeding, you have the experience that has been
7 documented elsewhere, people on the Internet who have
8 complained about problems with playback.

9 The nature of the harm is qualitatively
10 significant. If you were one of the people for who the
11 particular CD you have purchased does not play, it doesn't
12 play. So it's an -- it might be an all or a nothing thing,
13 but I think part of the problem in assessing the nature and
14 the qualitative and the quantitative aspects of the harm here,
15 is that the harm varies. And from my point of view, the harm
16 varies because it's an unintended malfunctioning.

17 But the point is, it's still a malfunctioning,
18 and where it malfunctions to the extent that someone can't
19 play music that they've purchased, they get nothing. They've
20 paid for their particular disk, and they have an expectation
21 that something that they have previously been able to play
22 CD's on will play the CD and yet they receive nothing.

23 So I would say for the people who are within the
24 scope of that class, that's a fairly fundamental harm.
25 They've experienced no benefit from the bargain they've made

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1 to purchase the CD.

2 MS. DOUGLASS: Within the scope of that class?

3 MS. HINZE: Within the scope.

4 MS. DOUGLASS: We're 49, but there's another

5 one besides the -- at least one more in addition to the 48.

6 But on one side I see, you know, 49 problems, and on the other

7 side I hear one tenth of one percent. So, you know, how do I

8 reconcile those?

9 MS. HINZE: Why, I'd like to make two apparently

10 inconsistent statements, but let me say this. The number of

11 comments that have been filed by consumers with the copyright

12 office in this proceeding is evidence. Direct evidence of

13 harm to consumers non-infringing uses. I think that's clear.

14 The fact that there are 48 or 49 comments is not necessarily

15 indicative of the level of harm that's out there.

16 So in terms of a comparison, on one side of the

17 table we have our belief that there are a number of these CD's

18 in existence in the United States. On the other side of the

19 table, you're comparing a statement from an industry

20 perspective, with an industry representative who has the

21 ability to get a industry-wide feedback on the number of

22 complaints they've received.

23 I guess on this side of the table, as much as I

24 would like to be the spokesperson or as much as any of us here

25 would like to be the spokesperson for the entire American

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1 consumer populace, we're not.

2 And in terms of the feedback that consumers have
3 given to the copyright office in support of the exemption
4 we're seeking here, I guess I would like to point out part of
5 the reason we suspect why the copyright office received
6 comments when it did was because EFF asked people on the its
7 mailing list if they had experienced these problems to write
8 to the copyright office.

9 We are a organization that has a membership of
10 about 9,000 people, and our mailing list actually goes to
11 about 30,000 people. That's a small part of the American
12 population. I would hasten to say that a larger proportion of
13 people probably don't even know that this proceeding is taking
14 place, and that the level of harm that is experienced out
15 there in the population is probably far greater then the
16 number of comments you've received with respect.

17 So, if in terms of apples and oranges, I think
18 it would be fair to say that the consumer experience is not
19 necessarily -- should not be regarded based on, just on the
20 information that's been submitted to the office in terms of a
21 numerical number of comments.

22 MS. DOUGLASS: I'll grant you that. Thank you.

23 MS. GROSS: Can I just follow up on that?

24 MS. DOUGLASS: Mr. Belinsky wants to say
25 something, too. Can --

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1 MS. GROSS: Okay. I just wanted to say that you
2 know, it's an interesting argument about is it nine titles?
3 Is it more than nine titles? What's the exact number of
4 comments received in the harm?

5 It seems to me that this is -- should really be
6 a principled argument, a principled analysis. That it is the
7 principle of the idea that when you buy a CD, you have the
8 right to play it. I mean, you know, what gives me the right
9 to throw this book in the air? Why own it?

10 The same things with the CD, what gives me the
11 right to listen to the CD? I own it, that's the right, so
12 it's the principle. It's not the number of titles that are
13 released, it's the legal principle here.

14 MS. DOUGLASS: Mr. Belinsky?

15 MR. BELINSKY: I just wanted to add one
16 observation, again from our perspective as being in the copy
17 protection business for quite a number of years. There is the
18 notion of the frustrated copier effect that we've seen over
19 and over again in video and in entertainment software, where
20 the existence of copy protection on a video cassette or a DVD,
21 or a CD ROM game brings consumers, quote unquote, complaints,
22 that are consumer complaints arise by virtue of the consumer
23 not being able to make a -- an extra copy, when heretofore,
24 before the existence of copy protection, he could.

25 So from the perspective of assuming there's a

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1 goal to try and measure how many complaints or how many
2 situations are arising, I think that we would suggest you need
3 to be somewhat careful when you look at the total volume of
4 input that you're getting because our experience, not so much
5 in music again, because it's so new from a timeline
6 perspective, but in video and in games, a substantial number
7 of the "returns" that came back to Blockbuster video or the
8 video game store were from consumers who were upset that they
9 could not make a copy, not that they could not play their
10 video or run their computer games. So just another data point
11 from the historical perspective.

12 MS. DOUGLASS: So you're saying that consumers
13 are mad and they just sent to the copyright office all these
14 problems they were having because they didn't really agree
15 with copy protection in the first place?

16 MR. BELINSKY: I'm not suggesting what the
17 consumers who talked, who communicated with the copyright
18 office were saying, but I am saying that we have very direct
19 evidence over the years that consumers have come back to
20 retail stores and said "This product doesn't work." When
21 indeed, what it turned out was, they couldn't make a copy and
22 they were upset about that.

23 MS. DOUGLASS: Okay.

24 MR. BELINSKY: Because they thought that it was
25 their right to make a copy.

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1 MS. DOUGLASS: So this product doesn't work
2 then translated into --

3 MR. BELINSKY: Because of copy protection.

4 MS. DOUGLASS: -- this product doesn't work like
5 it did before, or like I expected it to work.

6 MR. BELINSKY: Yeah, exactly. Yeah, and before
7 I could make extra copies, and now I can't, so it must not
8 work right anymore.

9 MS. DOUGLASS: I see, okay. I just think I
10 have one -- Oh, I'm sorry.

11 MR. MARKS: I would just like to make a couple
12 of comments. I do think, though that what you can take away
13 from the 48 comments is that from the 48, only three of them
14 addressed CD's that had been released in the U.S. that had
15 some kind of technological protection measure.

16 So I don't know whether the other reasons are
17 attributable to some of the things Mr. Belinsky said, but the
18 only record evidence here is essentially that 48. And there's
19 only three of the 45 titles that were discussed there that
20 that are actually U.S. released and are recordings that have
21 technological protection measures. And you know, aside from
22 that, I think whatever you might speculate about how many
23 people might complain or might not, I mean, this is a
24 proceeding that has to go by the record evidence and
25 (indistinguishable) the evidence that we can present is the

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1 .08 percent. You know, the evidence that's been presented by
2 the proponents is 48 complaints that detailed 45 CD's, only
3 three of which you know, fit within the scope of this
4 proceeding.

5 The second point that the EFF made that I wanted
6 to respond to about how there will be more. There may be
7 more, but we don't know what technology is going to be used,
8 and we don't know and shouldn't presume that things won't be
9 able to be played back. It is entirely speculative in that
10 regard.

11 Third point, somebody buys something. The
12 conclusion that they get nothing, not clear that that's really
13 the case. A number of things could be returned. Universal
14 had help lines, web sites that held so that people eventually
15 could have a place of -- I don't think we can draw the
16 conclusion that just 'cause you bought something and on your
17 first try or second try it didn't work, that you ended up with
18 zero value for the money that you spent.

19 And finally, with regard to Ms. Gross' comment
20 about you know, let's look at the principle, I think the
21 principle she enunciated is just wrong, as a matter of law.
22 And you know, that that legal forwarding is cited in there,
23 our papers, I don't know (indistinguishable).

24 MS. DOUGLASS: Okay, just one clarification.
25 The three titles were -- that you mentioned. Is it possible

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1 that some of those that were copy-protected; is it possible
2 that some of those could have been non-U.S. copy-protected?

3 MR. MARKS: There were five foreign releases
4 that I found. So it's possible that some of them had taken
5 the logical protection (indistinguishable) that weren't
6 released in the U.S.

7 MS. DOUGLASS: Okay. Thank you. Okay?

8 MS. PETERS: Now you brought with your long list
9 of questions.

10 MR. KASUNIC: I have so many, I may be putting
11 some of these in writing later, but let's just start with --
12 first, Mr. Marks. You mentioned that it's not clear whether
13 the technological protection measures are malfunctioning, or
14 whether this is some other kind of technical problem. Isn't
15 it -- are most -- prior to copy-protected CD's, understanding
16 the technology right, or essential Redbook CD's, most that
17 were put on the market for audio emphasis.

18 MR. MARKS: (Indistinguishable)

19 MR. KASUNIC: Okay, so if it -- wouldn't it be
20 one way to make determinations if a Redbook CD worked on these
21 devices, and a -- any kind of copy-protected CD did not work
22 on the device, wouldn't it be pretty safe to assume that the
23 problem was a result of the technological protection measure
24 rather than the consumer's technology, or operating system,
25 there was some kind of glitch in the way the media, the

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1 technological protection measure put on the media work?

2 MR. MARKS: I'm not sure that that is a safe
3 assumption, because, based on the number of complaints that we
4 know about, it was essentially the same number that you would
5 get from the release of standard Redbook audio.

6 So, you know, there's no clear indication that
7 the technical protection measure was the result of the
8 problems anymore than it could've been a manufacturing defect
9 or something else, because there was not -- it was consistent
10 with what you normally have in terms of a disk that may not be
11 able to play for any variety of reasons.

12 MR. KASUNIC: But then, isn't there an important
13 difference in this situation that these are protected by law
14 in terms of making any -- there was full of the problems that
15 people may have had with the Redbook audio, they couldn't make
16 them work. And they wouldn't have any violation of the law.

17 MR. MARKS: I'm not sure I understand the
18 question.

19 MR. KASUNIC: Well, the traditional Redbook CD's
20 didn't have any technological protection they used on them, so
21 if there was some kind of a malfunction on them, people could
22 do whatever they needed to do to get them to play on their
23 particular operating system. If they needed to tweak it in
24 some way in order to get it to play, they could do that,
25 right, without violating Section 1201,

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1 because there weren't any technological protection
2 measures on the Redbook CD's prior to these nine that
3 are on the market.

4 MR. MARKS: Well, if I -- I guess what I was
5 saying is that they may be able to do that here because it --
6 they may not be able to make them play, they may not have to
7 circumvent an access control.

8 MR. KASUNIC: Okay, well then let's go to that.
9 Now, I -- you mentioned that Congress envisioned use of
10 technological protection measures on copyrighted works to
11 enable and facilitate these being distributed. But didn't
12 Congress also envision and encourage use of technological
13 protection measures that had -- that making a distinction
14 between what type of technological protection measure was
15 being used? Didn't Congress envision that you would know if
16 it was a copy protection measure or an access protection
17 measure? And it seems to me here, the way we're talking about
18 this, no one's willing take a position on what is actually out
19 there.

20 So, it's virtually a situation of hide the ball.
21 No one knows what kind of technological protection measure is
22 on any given works anymore.

23 MR. MARKS: We don't believe it's our burden of
24 proof to come in and prove that something was an access
25 control or was a copy control, it was something else. That

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1 burden of proof lies with the proponents, so we're not saying
2 hide the ball, we're just simply responding according to the
3 burdens and prima facie cases that have been set forth by the
4 Librarian in these types of proceedings.

5 MR. KASUNIC: Wait, but this isn't a court of
6 law where the burden of proof is the same. We have to look in
7 terms of, in the broad sense of whether an exemption should be
8 issued, and that exemption would be technologically neutral
9 and would apply to all kind of technological protection
10 measures on the particular class of work.

11 So if it is unclear, then there seems like there
12 may be some sense of potential harm here. Do you know for
13 particular technologies -- we have some particular types of
14 technologies that were in the market, maybe we
15 (indistinguishable) then if there's another question about the
16 future, but when we're talking about the (indistinguishable)
17 as a data shield, for instance, or a media code version 1, or
18 a Sunny's Key to Audio, or in any one of those, can you tell
19 me whether it's a copy protection or a access protection
20 measure?

21 MR. MARKS: You know, Mr. Belinsky may be in a
22 better position than I am because I just am not a technology
23 person and don't know the specifics of those technologies. I
24 think the point is that when you're proposing an exemption,
25 you do have a burden there, and whether this is a court of law

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1 or not, it's a prima facie case that has to be made out, and
2 that -- included in that is to demonstrate that there is an
3 access control and that access control is problematic for some
4 reason, or causing a malfunction for (indistinguishable) rely
5 on the download type exemption or something
6 (indistinguishable).

7 MR. KASUNIC: Well, let's assume they've
8 satisfied me, and I think that they've passed the burden in
9 terms of showing that this is an access control. Is there
10 anything that you can offer on the other side that when I'm
11 balancing now, that will lead me to believe otherwise?

12 MR. MARKS: Sitting here, I try, I cannot. I
13 would say, however, that even if you assume that, they have
14 not proven a case that there's adverse impact. It is a
15 diminimus impact. 125,000 disks, only nine of which that have
16 been -- that includes (indistinguishable) technological
17 protection measure, even if you assume it's access.

18 There's no proof that it's been, that there's a
19 malfunction in the access protection measure. There's just no
20 record even on that. But there's certainly no substantial
21 adverse impact under the tests that have been set forth in the
22 evidence that's been presented.

23 MR. KASUNIC: Well, that leads me to my next
24 question. Which is -- we have a situation where there's -- we
25 have at least 48 established -- 48 or so, established

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1 complaints of problems -- identified problems with CD's
2 currently, so, in terms of actual harm of something, where
3 people aren't getting what they want, at least, there is some
4 record?

5 MR. MARKS: Again, that could be just a
6 manufacturing defect. The fact that somebody comes in and
7 files something and says, "I've had trouble playing this
8 disk," may have nothing to do with -- there's no nexus.

9 MR. KASUNIC: Well, there are certain CD's, at
10 least, where there seem to have been recurring problems on
11 them, so in terms of proof, (indistinguishable) disk, not all
12 of them, anyway, are just random problems, but there are
13 recurring problems that appear to be recurring in some of
14 those comments.

15 MR. MARKS: I'm not sure what of the three
16 actually occur or not.

17 MR. KASUNIC: But beyond that, isn't safe to
18 assume that although this is obviously for a legitimate
19 purpose, (indistinguishable) controlling massive unauthorized
20 file trading, that these are being put into the market, won't
21 these protection efforts invariably continue to cause problems
22 on many legacy systems and devices that are out there?

23 There's an extraordinary number of systems and
24 devices that it's going to be very difficult to have full
25 compatibility with down the road when there are many different

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1 kind of possible protection systems that will be tried. Isn't
2 it likely that more problems are going to occur, and that at
3 least some of those will be related to a causally related to
4 the technological protection?

5 MR. MARKS: You mean with these particular
6 disks?

7 MR. KASUNIC: No, I'm talking about into the
8 future.

9 MR. MARKS: No, I don't think you can draw that
10 conclusion, because it's entirely speculative to conclude that
11 the technology, if that were used, on these nine disks, are
12 ever going to be used again.

13 MR. KASUNIC: No, I'm not saying on those nine
14 disks, I'm saying any kind of technology that will be used in
15 the future. Isn't it going to be likely that there are going
16 to be some problems with the many types of legacy systems out
17 there, that you're not going to have full compatibility with
18 everything?

19 MR. MARKS: I don't believe you can conclude
20 that. I think it depends on the technology that will be used.
21 And we just don't know what that technology is today because
22 there are different companies, like Mr. Belinsky's company
23 that are trying to you know, market very good technologies,
24 and different content owners will make different decisions
25 about what technologies to use.

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1 MR. KASUNIC: Okay. My last question for you.
2 What harm would an exemption cause in this situation if it was
3 just for an individual being able to create interoperability
4 or compatibility with their device?

5 Given the limitation of that, the possibility
6 that this may occur anyway, whether there's an exemption or
7 not, people taking this, what harm of letting people just be
8 able to play what they have purchased on a device that where
9 there is a reasonable relationship -- we're not talking about
10 playing this on the toaster, but we are talking about playing
11 it on with the reasonable consumer expectation of playing it
12 on some kind of a CD player?

13 MR. MARKS: Well, I think that, for the most
14 part, those consumers are able to do that. Of the nine, some
15 had been re-released in unprotected form. Probably all of the
16 rest are available on new types of services, like the new
17 Apple service and downloading format, and could be downloaded
18 and played on that very device that they're trying to play the
19 disk on. So I don't think that there's any harm on the other
20 side.

21 I think the harm to our side in the very broad
22 exemption that's been proposed, is that by broadly exempting
23 all CD -- so-called CD copy-protected disks that have access
24 problems, you are interfering with the ability to develop the
25 new technologies that will be used in the future. Which is

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1 directly contrary to Congressional intent and directly harmful
2 to the industry's ability to market and to you know, defeat
3 piracy.

4 MR. KASUNIC: If I could just ask one question,
5 (indistinguishable) don't feel left out, that of the EFF and
6 IP Justice. Isn't it likely that the market will correct the
7 situation?

8 It's accepted that these malfunctions or
9 whatever they are, were not necessarily planned, but are just
10 the early action with the many types of systems out there, and
11 legacy systems existing. Isn't it likely that the recording
12 industry will try to you know, continue to accommodate and
13 make this less, make any problems that are occurring less
14 likely into the future?

15 And wouldn't a market solution to this be
16 preferable to just giving individuals who have the ability to
17 do so, the ability to circumvent?

18 MS. HINZE: I think that's a good question. As
19 I said, I -- EFF's position is that we believe that this is an
20 unintended consequence, so it's a fair question to us whether
21 or not we might expect to see this ameliorated. I have two
22 responses, one is even if it was unintended, the existing
23 situation is one where consumers can't play things on devices
24 that presumably they were intended to (indistinguishable) play
25 them on. For instance, the case of multi-section CD's.

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1 So even if it wasn't intended, there's currently
2 a problem. Whether or not a market, the market may be able to
3 address that in the future is, I think -- it's difficult for
4 me to speculate on that.

5 Obviously, if it's the intent of copyright
6 owners to, as they say, to have their work available in as
7 many different formats and as many different devices as
8 possible, you would expect to see that. But the situation
9 that we currently see is that, even if it weren't intended,
10 there's no way a significant impact on consumers. There will
11 continue to be a significant impact on consumers for the
12 legacy devices.

13 Even if I am to speculate and look into the
14 future and say, "Perhaps the copy protection technologies will
15 in the future somehow improve their compatibility with a whole
16 range of different devices, and magically those problems will
17 go away," there will continue to be a set of disks that are in
18 circulation and there will continue to be a set of playback
19 devices that will potentially have issues with those disks.
20 That's not going to go away.

21 I guess I would also like to address the burden
22 here. I've been told that EFF is willing to speculate, has
23 speculated in the future that there will be harm. What seems
24 likely is that there will be a large volume of copy-protected
25 CD's being released in the United States shortly. That much

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1 is clear. It seems likely there will be a significant time
2 lag before any changes exist to the copy protecting technology
3 that's currently being released. It's clear that the current
4 technology, the current (indistinguishable), copy-protected
5 technologies have problems, and that they were unintended.

6 I can't see that the market in the short term is
7 going to be up to address the current problem, and to the
8 extent that the market is able to address the problem going
9 into the future. Our exemption would only apply where there
10 is a malfunction, so in terms of that, a balance of harm
11 (indistinguishable) here, well, I would say is that the
12 consumers are the ones here who are currently bearing the
13 burden of harm. They have purchased something that they can't
14 use on advice they expect to be able to play back on.

15 The exemption we're proposing would allow them
16 to play it back, only to the extent that it malfunctions, to
17 the extent that the market is able to ameliorate these
18 problems in the future and improve some of the compatibility
19 issues, even if that's technically possible.

20 Our exemption would then not cover the
21 situations where a device can play back the purchased CD. So
22 there is no harm in granting the exemption from that point of
23 view from the copyrighter's point of view. There will not be
24 any significant loss from the point of view of having the
25 exemption granted.

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1 MR. MARKS: I don't think there's any basis to
2 conclude that any copy-protected CD's that are going to be
3 released in the market in the near future are going to be
4 based on the same technology. I just don't know how that
5 statement could be made. You know, Mr. Belinsky may have some
6 information on what kind of partnerships and deals his company
7 has done, but without seeing business plans about what's being
8 done, I just don't know how that statement can be made.
9 There's just no way, there's no evidence for it.

10 MS. HINZE: For the sake of clarifying the
11 record, I don't believe I said that I understood what the
12 technologies in the future would be, or that they would be
13 based on the current technologies. I was making a statement
14 about the current impact, and the statement -- my statement
15 about the future actually addressed the scope of our exemption
16 and whether or not it would apply in the event that
17 technologies were to improve and (indistinguishable)
18 compatibility.

19 I would just like to add that the -- again,
20 refer to the paper that EFF included in the comments we
21 submitted in December, which makes it clear that the nature of
22 the malfunctioning here is quite complex, it's difficult to
23 get a clear picture of that, exactly what formats will fail on
24 exactly which devices.

25 As I said, it appears to be that these

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1 technologies currently exploit differences between the way the
2 stand alone audio CD players work, and multi-format players
3 work. And to the extent that we've seen multi-format players
4 over (indistinguishable) stand alone, stand alone CD players,
5 it's more likely than not within the next three years, there
6 will be increasing problems, because the playbacks -- the
7 pirate problems from the point of view of the devices will
8 increase.

9 As people switch to these more modern players.
10 So, in terms of these speculations about future harm, I think
11 that should be taken into account.

12 MR. MARKS: I think (indistinguishable) actually
13 be the exact opposite, which is that you will see that .08
14 percent number go down as the technology is improved. And
15 along with you know, the clear incentives for the content
16 owners to be providing a consumer friendly experience for
17 their buyers.

18 MR. CARSON: Now that we have a consensus --

19 MS. PETERS: You guys make it so easy for us. I
20 think David has some concluding questions.

21 MR. CARSON: Okay. Let me start with, I'm
22 sorry. Is it Miss Hinz or Hinz?

23 MS. HINZE: I answer to both.

24 MR. CARSON: Preference? I would like to
25 accommodate you. You stated earlier, and it's in your written

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1 comment as well, that assuming that what we're dealing with
2 here is a malfunctioning copy control, there is uncertainty in
3 the legal community as to whether that constitutes
4 (indistinguishable) that controls access, copyrighted works,
5 correct?

6 MS. HINZE: Um-hmm.

7 MR. CARSON: And I know that in your written
8 comment you cited one article by Mr. Halderman. I haven't
9 looked at it yet, I apologize, I will. But I mean, first of
10 all, beyond that article, any other sources for that statement
11 that there's uncertainty in the legal community?

12 MS. HINZE: I can't point to a specific
13 (indistinguishable) sources, but I've had numerous
14 conversations with people who are well versed in the history
15 of Section 1201, and people who've been involved in the debate
16 about the interpretation of content scramble systems for
17 digital (indistinguishable). And the joint nature have
18 emerged, copy and access control. I think it's --

19 MR. CARSON: This isn't a question of merged copy
20 and access control, you're not even (indistinguishable) as
21 that.

22 MS. HINZE: Sorry?

23 MR. CARSON: You're not even (indistinguishable)
24 this is a case of merged copy and access control --

25 MS. HINZE: No --

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1 MR. CARSON: You're saying this is a copy control
2 that inadvertently blocks access.

3 MS. HINZE: That's correct. I would like to, I
4 guess, make two points. One is in terms of our understanding
5 of how to characterize this technology, we are partly
6 handicapped by the fact that there is no information out
7 there.

8 As far as we can tell, there is no application
9 of process information or a -- this is (indistinguishable) --
10 or a technology for us to fall within -- for a copy protection
11 technology that malfunctions to fall within the definition in
12 1201(3)(c) or (3)(b) of a technology protection measure that
13 effectively controls access.

14 So in terms of a strict legal analysis, I think
15 part of the reason why there is uncertainty is that people
16 don't feel comfortable that they have enough information to
17 know how this technology is operating. There is very little
18 publicly available information about exactly what is
19 happening. As Mr. Belinsky and Mr. Marks have pointed out,
20 there is a number of different technologies there has been
21 some work done on each of those but it's like, by no means
22 comprehensive.

23 And as far as we can tell, our position is that
24 it doesn't appear to fall within the definitions, as I said,
25 about effectively controlling access because there doesn't

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1 seem to be an application of the process of information. But
2 that is based on our limited understanding of what information
3 there is available publicly.

4 MR. CARSON: I guess, Mr. Marks, the point I --
5 well, it's your burden whether you have the information or
6 not.

7 MS. HINZE: Well, and it --

8 MR. MARKS: Well, the only thing else I would
9 point out is that there -- my understanding is there are
10 patent applications so those would presumably be, you know, a
11 good source of information as to how the technology works.

12 MS. HINZE: When the patent issues.

13 MR. MARKS: -- in this department. What was
14 that?

15 MS. HINZE: I said when the patent issues.

16 MR. MARKS: When.

17 MR. CARSON: Now, Mr. Marks, you did talk about
18 the burden of proof and we'll go with -- I think we're in
19 agreement at least somewhere along the road you're talking
20 about that we've already said the burden is on the proponent
21 of the exemption but let's explore how far that goes.

22 If we're going to talk about burdens of proofs
23 and presumptions, Lord knows it's been a long time since I've
24 studied that but (indistinguishable).

25 It's been awhile since I've even had to apply

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1 the Rules of Evidence but I'm going to give it a shot
2 here. Isn't there a Rule of Evidence that when
3 evidence on a particular issue is within the control
4 of one of the parties, even if that party doesn't
5 initially have the burden, the finder of fact is
6 entitled to infer, from that party's failure to come
7 forward with any information whatsoever when that
8 information is totally in that party's control, that
9 if that information were out it might be adverse to
10 the party who has control of it?

11 MR. MARKS: I'm not sure we're in control. We
12 didn't -- we're not the technology companies.

13 MR. CARSON: But you are the people who are
14 putting the stuff out.

15 MR. MARKS: That's right but --

16 MR. CARSON: You don't know what they do with
17 it. You just tell them to protect it and they protect it and
18 you're happy?

19 MR. MARKS: Well, I -- you know, I don't know
20 the answer to your -- my -- I don't want to tell you what
21 grade I got in evidence so that would help me explain why I
22 can't answer that. But the short answer is I don't recall the
23 evidentiary standards but, you know, the truth is I honestly
24 don't know to what extent we even have that information about
25 how the specific technology works anyway. But I don't know

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1 what else to say on that.

2 MR. CARSON: Okay. One final question to the
3 people on that side of the table, whether we're talking about
4 a copy protection -- well, let's assume for the moment,
5 because it really was inspired by the EFF testimony.

6 Let's assume for the moment we're talking about
7 a copy protection that just is screwing up and restricting
8 access unintentionally. Let's assume that. Based upon the
9 experience you're familiar with, what would one have to do in
10 order to be able to make one of those CD's that has the
11 malfunctioning copy protection work on the particular player
12 that you want to play it on but you can't play it on?

13 MS. HINZE: This comes not from personal
14 experience like he said, as a lawyer. However, I would hate
15 to be at risk of violating 1201(a)(1) since as I've not
16 actually heard a clear statement from the other side of the
17 room that they wouldn't sue consumers for having attempting to
18 circumvent what may ostensibly be a copy protection measure,
19 like we just said, it's not personal experience.

20 But however, my understanding is that it works
21 fairly well to use a felt tip marker to mark around the end of
22 the tape. Partly this is an issue about correct data being
23 put into table of contents is my understanding on the
24 technological (indistinguishable) of what works -- or how this
25 works. Remember you have -- when we have a CD which has copy

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1 protection and it's a multi-section CD for instance, on many
2 of these, it is visible that there is a second section.

3 MR. BUCHOLZ: There's a thin line between --
4 demarcating the two sections, the first and second section.

5 MR. CARSON: Can't see it from here but we'll
6 take your word for it.

7 MR. BUCHOLZ: Sure. We can show you after the
8 --

9 MS. HINZE: We'll be happy to show you that.
10 But basically, it's clear where the second section starts.
11 And apparently, it is possible to use a felt tip marker to
12 mark out the table of contents on the section that isn't
13 showing. And what that does is it basically prevents the
14 error from being introduced into the CD reader when it's
15 trying to read the table of contents. So it will see the
16 second section which -- well, it will see the first -- it will
17 see the section that it can't currently play. That's one way
18 of doing it. Essentially the same remedy happens if you use
19 masking tape to -- to again to obscure the section that won't
20 play.

21 MR. CARSON: All right. this is the rather
22 celebrate case we all read about a few months ago, I guess,
23 about how you can get by this with a felt tip marker. Am I
24 correct?

25 MS. HINZE: Right, right.

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1 MR. CARSON: Is it safe to assume in light of
2 that experience, that we're probably not going to be seeing
3 that particular technology in the marketplace again given now
4 everyone knows how easy it is to get around it?

5 MS. HINZE: I think that would be a question for
6 Mr. Belinsky rather than me.

7 MR. CARSON: Okay, fine. Let's embarrass him.

8 MR. BELINSKI: Oh, this is crazy. I believe
9 that the disk you have and certainly the Magic Marker approach
10 worked in one version of Sony's key to audio technology. I
11 can tell you for sure that that doesn't work with our
12 technology. It's not a very effective technology for that to
13 be the circumvention method.

14 And I can't speak to what Sony's doing today but
15 I can speak to the fact that that's absolutely not a
16 generalize-able approach that would render our copy protection
17 approach, our copy protection technology inapplicable. So I
18 think that is one example that it was highly celebrated in the
19 press, as you pointed out, and I don't know of any labels, any
20 music companies, not even Sony that continued with that
21 technology.

22 MR. CARSON: Is there any reason to believe that
23 Sony would continue to market that particular technology given
24 the publicity as to how easy it is to get past it?

25 MS. HINZE: Well, again, I obviously can't speak

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1 for the --

2 MR. CARSON: Let's use common sense here for a
3 moment.

4 MS. HINZE: The common sense would say no to
5 that. I mean I would --

6 MR. CARSON: So should we conclude that it's
7 likely that it's likely that's going to be happening in the
8 next three years?

9 MS. HINZE: The -- the --

10 MR. CARSON: That particular technology's going
11 to be deployed?

12 MS. HINZE: You know, I obviously can't speak on
13 behalf of the technology companies. Common sense would
14 suggest that that particular technology will presumably morph
15 into something a little bit more secure.

16 However, I think the general principle is that
17 there will be -- there will be copy-protected CD's in the
18 future and the technologies will have -- it will be -- there
19 will be a possibility that, for instance, there will be tools
20 available. Obviously, this proceeding can't actually address
21 tools so I'm aware of the limitations of what a copyright
22 office can do in this hearing crisis.

23 The existence of tools that may be available to
24 assist consumers to circumvent should an exemption be granted
25 and presumably needed, based on the interpretation of

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1 1201(a)(1). It's quite possible that in the future software
2 -- that software companies may, for instance, have incentive
3 for providing the software plays of CD ROMs, may have the
4 incentive for also producing more compatible drivers for their
5 -- there's a range of different way that this problem might be
6 meliorated.

7 It's different for me to speculate about what
8 the tools might that people might use to use them because as
9 everyone is aware that the existence of tools or the
10 manufacturing and trafficking in tools, unless they don't fit
11 the three conditions, would violate 1201(a)(2). So the fact
12 that I'm having trouble speculating about how this might work
13 in practice, I don't think actually (indistinguishable)
14 arguing about whether or not the exemption should be granted.

15 MR. CARSON: Okay. Let me come
16 (indistinguishable) may because the point of my question
17 really had nothing to do with felt tip markers. It had to do
18 with whether the prohibition on circumventing technological
19 measure that control access is likely to be preventing people
20 from engaging in non-infringing uses over the next three
21 years.

22 And part and parcel of that analysis, seems to
23 me, has to be you're making the case to us that in order to be
24 able to play those CD's on the player you want to play them
25 on, you need to circumvent an access control and there's a way

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1 to circumvent an access control that will let you do that.

2 If there isn't, then there's no point in talking
3 about this. So what I'm really trying to get at is do you
4 have any information that, by circumventing a technological
5 measure that controls access, you will be able to play those
6 copy-protected CD's on players that, at the moment, can't play
7 them?

8 MS. HINZE: Do I have any evidence at all,
9 essentially, is that --

10 MR. CARSON: Do you have any information on -- I
11 don't care about tools. A method, a way. Is this a futile --
12 if we gave you this exemption, would it be a totally futile
13 act because circumventing an access control wouldn't do you
14 any good?

15 MS. HINZE: Right. I think I understand the
16 nature of the question. As I understand it, there is software
17 that currently is available that allows people to -- that
18 would allow people to make use of this exemption.

19 MR. CARSON: It may or may not violate the
20 1201(a)(2) is what you're saying I gather.

21 MS. HINZE: I appreciate that but from the point
22 of view of answering your question --

23 MR. CARSON: No, no. What I'm really trying to
24 get at is --

25 MS. HINZE: Can I cite you examples of software

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1 that doesn't violate 1201(a)(2) --

2 MR. CARSON: No, no. I don't even care about
3 that necessarily but let's assume -- let's put that aside for
4 the moment. The software you're talking about, the way it
5 works is by circumventing an access control or circumventing
6 some kind of technological protection measure?

7 MS. HINZE: I'm not sure. I guess, one, that
8 would depend on whether or not this is an access measure,
9 which we appear not to have any agreement about. But two, I'm
10 not personally aware. I just understand that there are tools
11 that --

12 MR. CARSON: Okay. Well, let's ask it another
13 way then. Since the whole premise of your case here is that a
14 malfunctioning copy control or a hyperactive copy control is
15 also serving to block access, whether intended or not, is the
16 way -- do we know, do you know that the way to make that CD
17 play on a particular device is to overcome the copy control?
18 To circumvent the copy control? Is that the solution or is it
19 not?

20 MS. HINZE: Yeah. I think it's a technology by
21 technology thing. As I understand it there are distinct
22 differences between the ways that the three main -- four main
23 technology copy protection technologies work and I'm not sure
24 that I know the answer across each of the four of those.

25 MR. CARSON: So you're not sure whether we can

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1 do you any good, in other words; is that right or --

2 MS. HINZE: I think that -- I think -- I guess
3 my understanding of this is that people would have an
4 incentive for creating tools that wouldn't violate 1201(a)(2)
5 but could be used for exactly this purpose. If they were not,
6 the overhanging threat of a secondary circumvention liability
7 to the extent that tools currently existing can be used for
8 the current technologies that's largely because the tools have
9 been found by people who have arduously looked into this.

10 People are less inclined at the moment, to
11 arduously look into this because they worry about violating an
12 access protection measure and therefore violating 1201(a)(1).
13 If there were an exemption granted, I think that the flow and
14 effect would be that you would actually see the generation of
15 tools that don't violate 1201(a)(2) that might actually serve
16 to accommodate some of these purposes.

17 MR. MARKS: Well, then the tools that exist
18 today, do they address the copy controls or the access
19 controls? I mean I think that that's a key part of Mr.
20 Carson's question as well as -- I think that --

21 MR. CARSON: Well, not necessarily because one
22 of the premises is that you can't tell the difference between a
23 copy control and an access control or rather that a copy
24 control is acting as an access control. To buy her case we've
25 got to assume that the copy control is also operating as an

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1 access control whether intended as such or not. Right?

2 MS. HINZE: I'd have to think a little harder
3 about that. I mean I think that's essentially what we're
4 saying but I'm not sure about the second part of your
5 question. I would have to think about whether you have to --
6 for instance, there might logically be a space where you could
7 -- if an exemption were granted you could come up with some
8 sort of software that might, for instance, allow you to
9 potentially circumvent the access part but not the copy part.

10 I don't know if that's a -- the reason I'm
11 looking puzzled is I'm not sure, technologically, if that's
12 possible. I don't know the extent to which they merged as a
13 concept and whether it might be possible to have some
14 mechanism for circumventing one without the other. I think
15 that would be something that would be worked out by people who
16 have a better sense of how these four individual or however
17 many different types of copy protection technologies actually
18 work. I think it's difficult to speculate in the general, in
19 the abstract here.

20 MR. CARSON: Okay. Mr. Bucholz, did you have
21 anything else to say?

22 MR. BUCHOLZ: No, no. I'm fine. Thank you.

23 MS. PETERS: Mr. Belinsky, shed any light on
24 this?

25 MR. BELINSKY: A couple of things. First of

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1 all, we're experts at the technology and we're not as expert
2 at mapping the pieces of the technology to the specific
3 definitions in the law so I don't want to go onto thin ice
4 legally and say something that may or may not be correct.

5 But as I do understand the provisions with
6 respect to copy control system having information applied to
7 it to the presence or absence of which controls whether a copy
8 can be made or not, the technology that we're bringing to
9 market now, in particular, with the second section capability
10 that I described certainly includes that feature or that
11 attribute, where there's information required to, for example,
12 to move the music from the CD to the hard disk so you can play
13 it on the computer without the CD present.

14 There's information required to be present to
15 validate that you're moving it from an original disk to the
16 post-concussion. There's also information required to be
17 present when you want to move it off the computer to a
18 portable device to go jogging with your music. So as I
19 understand the interaction between the technology and the
20 provisions of the law, that would qualify as the technological
21 protection. I mean -- sorry -- as a copy control measure.

22 But it's also the aspect of in the context of
23 the two sections taken together, the information is added to
24 the first section so that the personal computer doesn't see
25 it. And that's where I go onto complete thin ice legally as

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1 to is that an access control measure as relates to just the
2 first section or is it because the two sections together is
3 really what, from our perspective, constitutes the copy-
4 protected CD.

5 Is that just additional information -- and we do
6 add additional information to the first section, the so-called
7 red book -- as part of the overall copy protection and
8 technology. That could also look like just another example
9 where extra information is added in so I'm really not capable
10 of parsing it in any more level of detail than that to shed
11 any light on is it copy control, is it access control.

12 My guess is, depending on which prism you looked
13 at it through, you know, and if you wanted to make very
14 detailed arguments you might be able to sustain both arguments
15 at any one point would be my guess, depending on how narrowly
16 you looked at it and whether you looked at the two sections
17 together or just the first section or just the second section.
18 It's just hard for me to say, not being -- not being a legal
19 scholar. That's the best light I can shed on how the
20 technology actually works.

21 MS. PETERS: Maybe after we read some of the
22 papers we may have some more questions.

23 MR. CARSON: Good chance.

24 MS. PETERS: Good chance. Okay. This was a
25 long session but thank you very much, all of you. We

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1 appreciate your being here and helping us try to figure out
2 how we're going to handle all the exemptions that have been
3 requested. So I think you'll hear from us and we'll be back
4 tomorrow morning at 9:00 o'clock, right? Right.

5 (Whereupon, the hearing in the above-entitled
6 matter was adjourned at 4:50 p.m.)

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